EDITOR'S NOTE

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No. 86-177-CFY
Status: GRANTED

Docketed:
August 2, 1986

Title: Anthony R. Tanner and William M. Conover, Petitioners
v.
United States

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: DeVault III, John A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 2 1986	G	Petition for writ of certiorari filed.
3	Sep 5 1986		Order extending time to file response to petition until October 6, 1986.
4	Oct 6 1986		Brief of respondent United States in opposition filed.
5	Oct 8 1986		DISTRIBUTED. October 31, 1986
6	Nov 3 1986		Petition GRANTED.
			**********
7	Dec 15 1986		Record filed.
8	Dec 15 1986		Certified copy of original record & C.A. proceedings, 27 volumes, received. (Box).
9	Dec 16 1986		Record filed.
10	Dec 16 1986		Certified copy of original record, 44 volumes, received.
11	Dec 22 1986		Brief of petitioners Anthony R. Tanner, et al. filed.
12	Dec 22 1986		Joint appendix filed.
14	Jan 20 1987		Order extending time to file brief of respondent on the merits until February 5, 1987.
15	Feb 5 1987		Brief of respondent United States filed.
16	Feb 6 1987		SET FOR ARGUMENT. Tuesday, March 31, 1987. (1st case)
17	Feb 10 1987		CIRCULATED.
18	Mar 13 1987	X	Reply brief of petitioners Anthony R. Tanner, et al. filed.
19	Mar 31 1987		ARGUED.

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CLERK

86-177

In The
Supreme Court of the United States
October Term, 1986

ANTHONY R. TANNER and WILLIAM M. CONOVER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether sworn evidence that jurors in a complex criminal case consumed drugs and quantities of alcohol throughout the proceeding, rendering them unable to review the facts, requires an evidentiary hearing to determine whether defendants were afforded a fair trial by a jury capable of deciding the case on the evidence.

II. Whether the reach of Section 371 should be extended to a conspiracy to defraud a private corporation which is neither an agency of the federal government nor its duly authorized representative, where the government has suffered no pecuniary loss.

LIST OF PARTIES TO PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties to the appeal to the United States Court of Appeal for the Eleventh Circuit.

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In The

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at *United States v. Conover*, 772 F.2d 765 (11th Cir.1985). The Court of Appeals' order denying rehearing and rehearing *en banc* is not printed in an official reporter at this date. The final judgment of the trial court was not printed in an official reporter.

STATEMENT OF JURISDICTION

This petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit arises from a decision by said court rendered September 30, 1985. The appellate court subsequently denied petitioners' timely petitions for rehearing and rehearing *en banc* on June 26, 1986. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C.§ 1254 (1) (1982).

STATUTORY PROVISIONS INVOLVED

This petition involves the sixth amendment of the United States Constitution, the federal conspiracy statute, 18 U.S.C.§ 371 (1982), and Federal Rule of Evidence 606(b). The portions pertinent to the issues raised herein are set forth below:

U.S.Const.amend.VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

18 U.S.C.§ 371 (1982)—*Conspiracy to Commit Offense or To Defraud United States:*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to affect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Fed.R.Evid.606—*Competency of Juror as Witness:*

"(b) Inquiry into validity of verdict or indictment.

"Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

STATEMENT OF THE CASE

Petitioners Anthony R. Tanner, a private contractor, and William M. Conover, the former manager of procurement of Seminole Electric Cooperative, were convicted of having conspired to "defraud the United States" by impeding the "function of the Rural Electrification Administration in its administration of its guaranteed loan program," and by depriving Seminole of "its right to the honest and faithful services of its employees."

After the verdict in the second trial (the first ended in a hung jury after six weeks), defense counsel received a telephone call from a juror stating that several jurors had consumed alcoholic beverages during luncheon recesses and had consequently fallen asleep during the afternoon

trial sessions. The trial judge tersely denied the request for an evidentiary hearing, stating, "I didn't see anyone sleeping" (Tr.XIX at 57)[1].

While the appeal was pending, counsel received an unsolicited visit at his home from another juror, who stated that he had been struggling with his conscience for months and felt the defendants should have an opportunity to be judged by jurors who "would review the facts right" (App. 47), rather than by people who felt as though they were "on one big party" (App. 26) and had "no business being on the jury" (App. 47). He confirmed in a sworn statement (App. 23) that many of the jurors were consuming large quantities of alcohol each day during the luncheon recess (a liter of wine by the foreperson, one or two mixed drinks each by two other female jurors, and a pitcher of beer each by the male jurors), and stated, in addition, that the four male jurors smoked marijuana daily during the lunch recess. Further, two of the jurors were "injesting" "a couple of lines" of cocaine at the City parking garage during the lunch breaks (App. 39-45), one of whom sold the other a quarter pound of marijuana during the trial (App. 51-52), and took marijuana, cocaine and drug paraphernalia into the United States District Courthouse and came out of the jurors' restroom "sniffing like he got a cold" (App. 38, 51). The juror concluded that the use of these intoxicants and narcotics caused the jurors to be "messed up," "stutter a . . . bit," and "falling asleep all the time during the trial"

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[1] As used herein, "Tr. —" refers to the trial transcript; "R. —" refers to the Record on Appeal below; and "App. —" refers to the Appendix to this Petition.

(App. 46), which prevented the jury from reviewing the facts in this complex case so as to afford the defendants a fair trial (App. 47).

Despite this sworn evidence of jury misconduct, the district judge again refused to hold an evidentiary hearing (R.1086-90) and the Eleventh Circuit affirmed, holding that the use of alcohol and narcotics by jurors did not constitute an "outside influence," under Fed.R.Evid.606(b) and, therefore, that "the district court was under no duty to investigate the allegations, and did not abuse its discretion in refusing to conduct an evidentiary "hearing" (App. 10).

The evidence showed that Seminole (a private Florida corporation owned by several rural electric cooperatives) borrowed funds from an agency of the United States Treasury in order to construct a coal-fired power plant and that the loan was guaranteed by the Rural Electrification Administration ("REA"). When the contractor for the patrol road beneath the power transmission lines was unable to construct these roads with the available sand fill material, Conover, the Procurement Manager, contacted his friend Tanner, who recommended the use of limerock overburden which he had available for sale. That material was inspected and approved by Seminole's engineering department. Because Seminole's internal policy required bids for contracts in excess of $200,000, specifications were drawn for fill material requiring limerock content in accord with the overburden recommended and supplied by Tanner, giving him an advantage over other bidders and violating Seminole's internal conflict of interest policies. The Eleventh Circuit rejected petitioners'

contention that the evidence did not establish a conspiracy or scheme to defraud the United States, as charged.

Specially concurring, Judge James C. Hill stated:

> "Section 371 criminalizes conspiracies 'to defraud the United States, or any agency thereof in any manner or for any purpose.' It does not criminalize a conspiracy to defraud a private party. The evidence in this case was sufficient to prove that the defendants conspired to defraud Seminole Electric. In my view, however, the prosecution did not prove a conspiracy to defraud the government of the United States" (App. 17).
>
> "No Supreme Court decision has upheld a conviction under section 371 . . . where the defendants neither defrauded the federal government of its funds or property nor interfered with United States government officials or their agents performing an official function of the federal government" (App. 17-18).
>
> "[I]n section 371 Congress obviously did not criminalize every conspiracy with the intent or effect of thwarting that objective. Congress has demonstrated well its ability to utilize the criminal law to protect its far-flung financial and other interest in non-federal programs and entities. Because it has not done so here, section 371 should not be construed to reach appellants' acts" (App. 21-22).

After having been pending before the Court of Appeals for more than nine months, the petition for rehearing and suggestion for rehearing *en banc* were denied. This petition followed.

ARGUMENT

Point I

The Eleventh Circuit's decision, which holds that sworn evidence that jurors in a complex criminal case were consuming drugs and quantities of alcohol which rendered them unable to review the facts, does not require an evidentiary hearing because Fed.R.Evid.606(b) is limited to " 'extraneous prejudicial information . . . or . . . outside influence' " (App. 10), is contrary to the decisions of this Court which hold that the sixth amendment guarantees a criminal defendant the right to a trial by a panel of jurors capable of deciding the case on the evidence.

The sixth amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." (U.S. Const. amend.VI). This Court has long recognized that the foundation of our system of criminal justice is the right to a trial before "a jury capable and willing to decide the case solely on the evidence before it . . . ." *Smith v. Phillips*, 455 U.S.209, 217 (1982). *Accord Parker v. Gladden*, 385 U.S.363, 364 (1966); *Turner v. Louisiana*, 379 U.S.466, 472 (1965); *Irvin v. Dowd*, 366 U.S.717, 722 (1961).

In *Smith v. Phillips*, this Court emphasized that where the impartiality of a juror is challenged, the defendant has a right to an evidentiary hearing to determine whether defendant was afforded a fair trial.

> "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215 [citing *Remmer v. United States*, 347 U.S.227 (1954)].

In *Remmer v. United States*, 347 U.S.227, 229 (1954), this Court held that evidence of outside influence on a juror during the course of trial was "deemed presumptively prejudicial," thereby requiring an evidentiary hearing at which the government has the heavy burden of demonstrating "such contact with the juror was harmless to the defendant." Where there is sworn evidence that the jurors were not able to comprehend and review the facts because of their inebriated condition, a defendant should be entitled to the similar right to a *Remmer*-type hearing.

This and other courts have recognized the right to a mentally competent jury. *See, e.g., Jordan v. Massachusetts*, 225 U.S.167 (1912); *Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir.1980) (trial before jury with an insane juror inconsistent with due process). However, the Eleventh Circuit opinion would limit the scope of the sixth amendment's protection to instances involving " 'extraneous prejudicial information' " or " 'outside influence'." Thus, under the Eleventh Circuit's rationale, if a party discovered after the verdict that a number of the jurors were incompetent or deaf, no evidentiary hearing would be required to determine whether such infirmity rendered them incapable of comprehending the evidence and rendering an impartial verdict because those impairments do not involve " 'extraneous prejudicial information' " or " 'outside influence'." Here, a sworn statement demonstrates that the jurors in this case, by their excessive use of intoxicants and narcotics, were "flying," "messed up," "falling asleep," and clearly unable to comprehend and review the facts in this complex criminal case (App. 45-46). To hold that such evidence does not require an evidentiary hearing, much less a new trial, ignores this Court's consistent commitment to the sixth amendment's guarantee to a fair hearing by a panel of impartial jurors "capable and willing to decide the case on the evidence" *Phillips, supra*, 455 U.S. at 217.

Moreover, the Eleventh Circuit's opinion, which holds that substance abuse (whether occurring in a restaurant or a parking garage or in the jury room itself), does not constitute any " 'outside influence' " under Rule 606(b), stands alone and is contrary to every treatise or case that has yet addressed that issue:

> "Rule 606(b) would not render a witness incompetent to testify to jury irregularities such as intoxication . . . regardless of whether the jury misconduct occurred within or without the jury room." 3 J.Weinstein and M.Berger, Weinstein's Evidence ¶606[04] at 606-29 through 606-32 (1985).[2]

We are unaware of any prior case involving juror misconduct of such an egregious nature (and the government has cited none). This Court denied certiorari in *McIlwain v. United States*, — U.S.—, 104 S.Ct.409 (1983), where the fact that the foreperson was drinking prior to deliberation was called to the trial court's attention. The

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[2] *See, e.g., United States v. Taliaferro*, 558 F.2d 724, 726 (4th Cir. 1977), *cert.denied*, 434 U.S.1016 (1978) (evidentiary hearing held to determine whether drinks consumed at dinner affected jurors in the performance of their duties); *Jorgensen v. York Ice Machine Corp.*, 160 F.2d 432, 435 (2d Cir.), *cert.denied*, 332 U.S. 764 (1947) (L. Hand, J.) (drunkenness and bribery are matters about which jurors may give testimony after the verdict); *Faith v. Neely*, 41 F.R.D.361, 366 (N.D.W.Va.1966) (affidavit claiming one juror was intoxicated caused court to present questionnaire to each juror to determine whether the "juror's faculties were affected and [whether] he could . . . discharge his duties"); *Gamble v. State*, 33 So.471, 473 (Fla.1902); 8 Wigmore *Evidence* § 2354 at 703 (McNaughton rev.1961).

judge immediately held a separate *voir dire* of each juror, ordered a three-day recess and, upon examination the following Monday, detected no further disability. *Lee v. United States*, 454 A.2d 770, 774 (D.C.App.1982). The District of Columbia Court of Appeals noted:

> "During this whole process, only one juror was involved, and only a short period of deliberations was called into question. There is no evidence that any drinking actually occurred in the jury room or during the course of the trial, and the jury foreperson was not conclusively shown to have been intoxicated at the time of *voir dire*. The recess, coupled with the judge's checking in on the jury on Monday, both of which were done with the concurrence of appellant's counsel, foreclosed the possibility of prejudice. Under these circumstances, it cannot reasonably be said that the appellants were substantially deprived of their right to the judgment of objective and competent jurors." 454 A.2d at 772.

By contrast, the sworn evidence presented here shows that at least seven of the jurors consumed large amounts of alcohol and/or drugs; that the drinking of alcoholic beverages and smoking of marijuana together occurred throughout the course of the proceedings; that cocaine was being used on a regular basis; and that drugs and paraphernalia were actually taken into and used in the jury room. And here, *no* evidentiary hearing was ever held.

The dissent of Mr. Justice Marshall from the denial of the petition in *McIlwain* applies with even greater force to the facts presented in the instant case:

> "This Court has repeatedly insisted in a wide variety of contexts that the right to be tried before a jury capable and willing to decide a case solely on the evidence before it is a cornerstone of our criminal justice system. See, e.g., *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). This precious right is denigrated when a conviction resting upon deliberations tainted by a juror's gross and debilitating impropriety is allowed to stand." — U.S. at —, 104 S.Ct. at 411.

> "[D]ue process may well require the granting of a mistrial whenever a trial judge finds that a juror, already engaged in deliberations, is so drunk that the deliberations must be recessed. This rule would undoubtedly affect very few trials; drunkenness on the part of active jurors is certainly an abberation. As to objections that this *per se* rule would create inconvenience and pose a drain on judicial resources, the only response is that such costs are what we must pay in order to give more than lip service to our claim that trial by an impartial and competent jury constitutes a 'priceless' right. *See Irvin v. Dowd, supra*, 366 U.S. at 721, 81 S.Ct. at 1641." — U.S. at —, 104 S.Ct. at 412-13.

Point II

The Eleventh Circuit's opinion extends the reach of Section 371 to a conspiracy to defraud a private corporation which is neither an agency of the federal government nor its duly authorized representative, where the government has suffered no pecuniary loss.

As stated by Judge Hill:

> "No Supreme Court decision has upheld a conviction under section 371 . . . where the defendants neither defrauded the federal government of its funds or property nor interfered with United States government officials or their agents performing an official function of the federal government." (App. 17-18, Hill, J., specially concurring.)

Yet the majority's opinion extends the reach of Section 371 to a conspiracy involving allegations that a private con-

tractor defrauded "a private party .... Seminole Electric .... [without any proof of] a conspiracy to defraud the government of the United States" (App. 17).

Seminole Electric is neither an agency of the federal government nor its representative performing a duly authorized federal governmental function. Granted, it received a loan from a federal agency, and its loan was guaranteed by the REA, but as noted:

> "Congress has deliberately avoided undertaking the construction of rural power plants as a federal government enterprise. I have little doubt that Congress has an interest in 'seeing that the entire project [receiving its aid] is administered honestly and efficiently and without corruption and waste' .... But in section 371 Congress obviously did not criminalize every conspiracy with the intent or effect of thwarting that objective" (App. 21).

Thus, the panel's opinion ignores the limitations previously imposed on the reach of Section 371 and would criminalize any dishonest act involving any program funded or guaranteed by the federal government. As stated by Judge Hill: "By artful lawyering, one might easily blur the distinction between the United States government and those receiving its support beyond clear recognition" (App. 20).

The Fifth Circuit squarely addressed this issue in *United States v. Porter*, 591 F.2d 1048 (5th Cir.1979)[3], where

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[3] The holding in *Porter* limiting application of Section 371 to instances involving loss of federal funds or property, or interference with federal officials or their authorized agents, is consistent with established case law. *See, e.g., United States v. Johnson*, 383 U.S.169 (1966); *United States v. Walter*, 263 U.S.15 (1923); *United States v. Brasco*, 516 F.2d 816 (2d Cir.), *cert. denied*, 423 U.S.860 (1975); *United States v. Del Toro*, 513 F.2d 656 (2d Cir.), *cert.denied*, 423 U.S.826 (1975).

physicians who obtained increased fees by submitting blood samples to "manual" rather than "automated" laboratories for testing were charged with conspiracy to defraud the United States of its "right to have the Medicare program conducted honestly, fairly and free from deceit" (591 F.2d at 1055). The Court reversed their convictions, holding that if the government proceeds under a theory of interference with a federal agency, it must specifically plead and prove the governmental function which has been obstructed:

> "Since it is conceded that the government has not been subjected to any property or pecuniary loss by the activity set forth in the indictment, the conspiracy count can stand only if the government can point to some lawful function which has been impaired, obstructed or defeated. The government simply asserts that it was defrauded of its right to have the Medicare program conducted honestly and fairly. In our opinion, in the context of a criminal prosecution, the government has failed to demonstrate interference with any of its lawful functions." 591 F.2d at 1055-56.
>
> "We must hold that the indictment failed to charge a conspiracy to defraud the United States and that the government failed to prove any such conspiracy at trial. It is our affirmative duty to carefully scrutinize indictments under the broad language of the conspiracy statute because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the guilty. We cannot hold that the defendants' conduct was 'plainly and unmistakably' proscribed by 18 U.S.C. § 371." *Id.* at 1057 (citations and footnote omitted).

The present indictment mirrors that found defective in *Porter:* It charges a conspiracy to interfere with the lawful functions of a governmental agency, but does not specify how the defendants' conduct caused such an obstruction or

interference; it does not allege any loss of government property or money; it does not allege that the contracts or the bidding procedure required REA approval; and it does not allege that any statute or regulation was violated by the alleged conspiracy. Neither did the proof at trial establish those elements.

One year later, another panel of the Fifth Circuit in *United States v. Burgin*, 621 F.2d 1352 (5th Cir.), *cert. denied*, 449 U.S.1015 (1980) (speaking through District Judge Garza, who wrote the majority opinion in the instant case), held the conspiracy statute *did* reach the actions of a state senator who used his position to exert undue influence upon officials of the state agency charged with administering a federally-funded Head Start training program. In his opinion for the majority in the instant case, Judge Garza does not even purport to limit the reach of Section 371 to cases involving "public officials" or "agents of the United States" (as he did in *Burgin*), but would encompass *all* projects with any nexis to the federal government. Thus, presumably, a home builder who defrauded a private individual whose mortgage was insured by the Federal Housing Authority would now be subject to the federal conspiracy statute, since Congress clearly would desire the project to be carried out "honestly and without corruption and waste." This Court has not approved such a broad extension of the consiracy laws, nor has Congress indicated an intent to make conduct against a private corporation without loss of federal funds a crime against the United States. Judge Hill in his specially concurring opinion recognized that "where a state or private party is simply acting as an agent of the United States government in the implementation of a truly federal program, a fraud upon the

agent may constitute a fraud upon the United States" (App. 19). However, he urged that

> "the courts should not generally find such an agency relationship in the absence of compelling evidence that the state or private party was in fact defrauded while acting as a mere agent of the federal government performing a constitutionally legitimate and duly authorized function of the federal government, rather than as a non-federal entity receiving some form of federal assistance" (App. 19).

In this case, clearly "Seminole Electric is neither an agency of the federal government nor its representative performing a duly authorized federal governmental function" (App. 21). Under such facts, the expansion of the federal conspiracy statute is wholly unwarranted and deprives these defendants of their due process right to a statute which "plainly and unmistakably" proscribes the conduct before they are punished for its violation. (*Porter, supra*, 591 F.2d at 1055.) As emphasized by Judge Hill:

> "Courts must always remain mindful, however, of the admonition that penal statutes are to be strictly construed, a rule that is 'perhaps not much less old than construction itself.' *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) (Marshall, C.J.). . . . Thus it is essential that section 371 'plainly and unmistakably' proscribe the conduct of defendants before they are punished for its violation. [Citation omitted.] Courts may necessarily find it difficult to formulate and apply a definition of 'defraud,' as that term is used in section 371, that men and women 'of common intelligence' will easily understand. . . . 'The United States,' however, is a term that need not be so broadly and mysteriously defined" (App. 20-21).

CONCLUSION

For the above-stated reasons, petitioners respectfully request the Court to issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit remanding the case for entry of a judgment of acquittal. Althernatively, the Court should require the district court to conduct a *Remmer*-type evidentiary hearing on juror misconduct.

Respectively submitted,

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William M. Conover

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October Term, 1986

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3431
84-3876

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM M. CONOVER and
ANTHONY R. TANNER,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion ——, 11 Cir., 198-, —— F.2d ——).

(Filed June 26, 1986)

Before HILL and ANDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who

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* Honorable Reynaldo G. Garza, U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.
ENTERED FOR THE COURT:

James C. Hill
United States Circuit Judge

UNITED STATES of America,

Plaintiff-Appellee,

v.

William M. CONOVER and Anthony R. Tanner, Defendants-Appellants.

Nos. 84-3431, 84-3876.

United States Court of Appeals,
Eleventh Circuit.

Sept. 30, 1985.

Appeals from the United States District Court for the Middle District of Florida.

Before HILL and ANDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge.

GARZA, Senior Circuit Judge:

A jury convicted William M. Conover and Anthony R. Tanner of conspiring to defraud the United States in violation of 18 U.S.C. § 371, and committing various acts of mail fraud in connection with the conspiracy in violation of 18 U.S.C. § 1341. Conover and Tanner have appealed, arguing that the district court abused its discretion in refusing to investigate allegations of juror misconduct; that the conspiracy count of the indictment failed to charge a crime against the United States; that the evidence is insufficient to support the mail fraud convictions; and that the district court made various evidentiary rulings which warrant reversal. We affirm the convictions.

I

Seminole Electric Cooperative, Inc. ("Seminole"), is a Florida corporation owned by several rural electric cooperatives located in central Florida. In 1979, Seminole borrowed over $1.1 billion from the Federal Financing

Bank, which is an agency of the United States Treasury, for the purpose of constructing a coal-fired power plant near Palatka, Florida. The loan was guaranteed by the Rural Electrification Administration ("REA"), which is an agency of the United States Department of Agriculture. The REA administers a guaranteed loan program for eligible rural electric cooperatives. Conover was employed as Seminole's manager of procurement.

Construction of the plant began in September 1979. In order to install a transmission line running from the plant to a substation located outside of Ocala, Florida, it was first necessary to build a fifty-one mile patrol road. The patrol road had to be made of materials which would support heavy trucks and resist flooding. The construction contract for the patrol road was originally awarded to Journagan Construction Company ("Journagan").

Journagan encountered problems soon after construction of the road began. It had been assumed that Journagan would be able to use sand located in the area where the road was being built. As it turned out, however, the sand would not compact to a density sufficient to support even lightweight vehicles. Seminole hired the engineering consulting firm of Ross and Associates ("Ross") to evaluate the situation. Ross suggested that the natural sands be used as the primary fill material, and then topped with a sand-clay mixture which would be more cohesive and stable. Journagan began to implement this method, but soon encountered difficulty in obtaining sufficient amounts of clay.

A meeting was held at Seminole's Tampa office in March 1981. The purpose of the meeting was to discuss ways of accelerating the construction project. The problem of obtaining adequate fill materials for the patrol road was

also discussed. During the meeting, Richard Sherrill, Seminole's supervisor of transmission engineering, instructed Conover to locate sources of fill material. Journagan representatives indicated that they had not attempted to locate alternative fill materials. They also indicated that the contract price would have to be increased substantially in order for them to complete the road. Journagan's contract was subsequently terminated.

Following the meeting, Conover called Tanner. Tanner owned a limerock mine, and was also involved in the real estate development business. Tanner and Conover discussed the possibility of using limerock and limerock overburden as an alternative fill material. Limerock overburden is a material which is generally found above limerock deposits. On March 26, 1981, at Conover's request, Seminole engineer Ken Bachor examined the fill material available at Tanner's Citra Mine. Bachor later advised Sherrill that the material would be adequate for the project. Sherrill subsequently issued a purchase order to acquire enough limerock overburden to keep construction underway. Conover did not investigate any other sources of alternative fill materials.

Tanner and Conover were friends, and had gone on several fishing trips together. They had flown to the Bahamas together in Tanner's private plane in 1980. In May 1981 Conover purchased a condominium from Crystal River Investors, a company owned by Tanner. Tanner loaned Conover $6000 so that Conover could close on the condominium; this money was repaid in June 1981. Previously, in January 1981, Conover had contracted with Tanner to perform landscaping work and install a sprinkler system at the condominum complex for a fee of approximately

$13,750. On March 9, 1981, Tanner gave Conover a check for $10,035 which was allegedly made in partial payment of the money owed under the landscaping contract. Conover received a total of $15,000 under the landscaping contract. The record does not reflect how much of the $15,000 was profit.

With Journagan no longer working on construction of the patrol road, it became necessary to award a new contract for the construction of the patrol road through Seminole's formal competitive bidding procedure. Seminole decided not to award just one contract for the patrol road project as it had done with Journagan. Instead, the company decided to bid out two separate contracts: one to provide fill material and one to provide for the spreading of the fill material. The specifications for the fill material described in the contract were drawn up by Seminole's procurement department. The specifications stated that the fill material had to have a limerock content of at least twenty percent. This requirement worked in favor of Tanner for several reasons. First, the Citra Mine was relatively undeveloped. That is, there was a great deal of overburden still present above the limerock deposits; consequently, it would be easy for Tanner to remove the overburden, then mix in only the minimum amount of limerock necessary to meet the specifications required by the contract. Second, the contract specifications excluded contractors who could have made bids had the contract required the use of a sand and clay mixture rather than a limerock mixture. Additionally, one contractor complained that the time period in which bids had to be submitted was too short. Tanner submitted the lowest of several bids made on the fill contract, and was awarded the job. Tanner also made the lowest bid on the spreading contract, and was awarded that job as well.

More problems arose after Tanner began working on the road. First there was a dispute as to which party, Seminole or Tanner, was required to maintain the access roads leading to the patrol road. Conover and another Seminole employee advised Kenneth Bachor, Seminole's manager of transmission engineering, that the contract was ambiguous, and that Seminole should pay; Seminole ended up paying the costs of maintaining the access roads. Subsequently, REA complained that the bond provided by Tanner was unacceptable because the bonding company was not on the Treasury Department's list of approved sureties. In a letter dated July 17, 1981, Conover told another bonding company that the patrol road had been "essentially" completed, and that the work had been performed in a satisfactory manner. In another letter dated July 6, 1981, Conover stated that fifty percent of the road had been completed. In fact, the road was less than half finished at that time. It was also learned that limerock weakens when it becomes wet; consequently, the limerock mixture could not be used in areas subject to water flooding. As a result, "clean sand" had to be substituted in high-water areas. Tanner charged $4.75 for each cubic yard of fill material delivered and spread; Journagan had been charging only $3.82 per cubic yard of pure sand delivered and spread. The patrol road was completed in October 1981.

Prior to the time the road was completed, in June 1981, representatives of the Withlacoochie Rural Electric Cooperative, Inc., which was a member of the Seminole

cooperative, demanded that Seminole terminate all business relations with Tanner. This demand was based on alleged improprieties in the manner in which the contracts with Tanner had been awarded. Federal authorities were investigating the situation by November 1981. Conover was subsequently suspended, then demoted, for violating Seminole's conflict of interest policies.

Tanner and Conover were first indicted in June 1983. The six week trial that followed resulted in a hung jury, and a mistrial was declared. Tanner and Conover were subsequently reindicted on a five count indictment. Count I alleged that Tanner and Conover had conspired to defraud the United States in violation of 18 U.S.C. § 371; counts II through V alleged separate instances of mail fraud in violation of 18 U.S.C. § 1341. Conover was convicted on all counts. Tanner was convicted on counts I, II, IV, and V. Two motions for new trial based on allegations of jury misconduct were filed; both were denied.

II

Appellants' first contention is that the district court erred in refusing to conduct an evidentiary hearing for the purpose of investigating claims of jury misconduct. The factual underpinnings supporting this contention are somewhat unusual. Allegations of jury misconduct were originally pressed by the appellants while their motion for new trial was still pending. In a sworn affidavit, Tanner's attorney stated that he received an unsolicited phone call from a juror. The juror told Tanner's attorney that several members of the jury had been drinking during the lunch recess, and that several jurors had fallen asleep dur-

ing the trial. The district court considered the affidavit, heard arguments on the matter, and denied the motion for new trial.

Subsequently, and while the appeal of the case was pending in this court, Tanner filed, and Conover joined in, a motion for new trial based on newly discovered evidence of jury misconduct. In another affidavit, Tanner's attorney stated that on October 13, 1984, he received an unsolicited visit (at his residence) from a second juror. This juror was formally interviewed, presumably at the request of Tanner's attorney, by two private investigators on October 15. The interview was transcribed; the transcript was sworn to by the juror, and attached to the motion for new trial.

During the interview, the juror made a number of alarming allegations concerning the conduct of the jurors. He said that "the jury was one big party," and that several jurors, himself included, drank beer and smoked marijuana during the noon recess. He also stated that two of the jurors had on occasion injested cocaine during the noon recess, and that he had learned that one of these two jurors had offered to sell the other a quarter-pound of marijuana. He also indicated that he had voluntarily come forward with this information to clear his conscience, and that he had not received or been promised any type of remuneration for his statement. The trial court denied the motion for new trial based on this newly discovered evidence without first conducting an evidentiary hearing.

The decision to investigate allegations of jury misconduct rests within the sound discretion of the district court. *See U.S v. Darby*, 744 F.2d 1508, 1540 (11th Cir.1984).

"[T]here is no *per se* rule requiring an inquiry in every instance." *Id.* (quoting *U.S. v. Barshov*, 733 F.2d 842, 851 (11th Cir.1984)). When an evidentiary hearing is conducted, the inquiry is limited to determining "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *See* FED.R. EVID. 606(b). The affidavit supporting appellants' motion for new trial does not allege that prejudicial information was brought to the jury's attention. Similarly, it does not allege that any outside influence was brought to bear upon any juror. Even if the allegations of substance abuse were true, there is no "adequate showing of extrinsic influence to overcome the presumption of jury impartiality." *Barshov*, 733 F.2d at 851. Thus, the district court was under no duty to investigate the allegations, and did not abuse its discretion in refusing to conduct an evidentiary hearing.

III

Appellants next contend that the indictment failed to charge, and the evidence did not establish, a conspiracy to defraud the United States. It is argued that a conspiracy to defraud the United States must involve a knowing violation of a federal agency's rules, regulations, or procedures.[1] The law does not, however, require such a showing.

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1. In connection with this assertion, appellants argue that the district court erred in excluding a letter from an REA representative to Harry Wright, Seminole's general manager. The letter stated that Seminole was not required to obtain REA approval of two of the contracts which had been awarded to Tanner. The letter also states that the bidding procedures used for

(Continued on following page)

Count I of the indictment charged appellants with violating 18 U.S.C. § 371. Section 371 provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof *in any manner or for any purpose*, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 371 (emphasis added). The Supreme Court has construed section 371 as reaching "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." *Dennis v. United States*, 384 U.S. 855, 861, 86 S.Ct. 1840, 1844, 16 L.Ed.2d 973 (1966). The Court has also explained what types of fraud are contemplated by the statute:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention.

(Continued from previous page)

those contracts did not require REA approval. Had the government been required to show a knowing violation of an REA rule, regulation, or procedure, the letter would have clearly been admissible. In light of our rejection of that contention, however, we fail to see the error in its exclusion.

Hammerschmidt v. United States, 265 U.S. 182, 188, 44 S.Ct 511, 512, 68 L.Ed. 968 (1924).

The conspiracy count in this case charged appellants with conspiring to defraud the government by "impeding, impairing, obstructing and defeating the lawful functions of the Rural Electrification Administration in its administration and enforcement of its guaranteed loan program." Count I also alleged twenty-five overt acts committed in furtherance of the conspiracy. Listed among these overt acts were the questionable business transactions which gave rise to this case. The evidence is clearly sufficient to support the conclusion that these transactions occurred.

Appellants suggest that these transactions showed, at the most, violations of Seminole's conflict of interest policy, not the existence of a conspiracy to defraud the REA. We reject appellants' contention that the indictment failed to charge a crime under section 371. There is no requirement in the statute, or in the cases construing the statute, that the object of the conspiracy must be to cause a financial loss to an agency of the government. *United States v. Burgin*, 621 F.2d 1352, 1356 (5th Cir. 1980); *United States v. Anderson*, 579 F.2d 455, 458 (8th Cir.), *cert. denied*, 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651 (1978). Nor is there any requirement that the indictment charge a knowing violation of an agency's rules, regulations, or procedures. The statute is designed "to protect the integrity of the United States and its agencies, programs, and policies." *Burgin*, 621 F.2d at 1356. Moreover, "[t]he United States has a fundamental interest in the manner in which projects receiving its aid are conducted. This interest is not limited strictly to accounting for United States Government funds invested in the project, but extends to seeing that the entire

project is administered honestly and efficiently and without corruption and waste." *United States v. Hay*, 527 F.2d 990, 998 (10th Cir. 1975), *cert. denied*, 425 U.S. 935, 96 S.Ct. 1666, 48 L.Ed.2d 176 (1976) (citing *United States v. Thompson*, 366 F.2d 167 (6th Cir. 1966), *cert. denied*, 386 U.S. 945, 87 S.Ct. 980, 17 L.Ed.2d 875 (1967)). It is undisputed that the money used to construct the power plant was borrowed from the Federal Financing Bank, which is an agency of the United States Treasury; nor is it disputed that the loan was guaranteed by the REA, which is also an agency of the federal government. The evidence supports the conclusion that Tanner and Conover engaged in collusive and dishonest business practices. This constituted a fraud on the United States under section 371.

IV

Appellants next contend that the evidence is insufficient to support their convictions[2] on the mail fraud violations alleged in counts II through V. The mail fraud statute, 18 U.S.C. § 1341, prohibits the use of the mails for the purpose of executing any scheme or artifice to defraud. The indictment charged that appellants used the mails for the purposes of (1) defrauding "the United States by impeding, impairing, obstructing and defeating the lawful function of the [REA] in its administration and enforcement of its guaranteed loan program;" and (2) defrauding Seminole "of its right to have its process and procedures for the

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2. Conover was convicted on each of the mail fraud violations alleged in counts II through V. Tanner was convicted on the mail fraud violations alleged in counts II, IV, and V; he was acquitted on count III.

procurement of materials, equipment and services run honestly and free from deceit. . . ."

Appellants argue that the convictions on counts II through V can be upheld only if the evidence establishes that they used the mails in effectuating a scheme to defraud Seminole. This is so, appellants contend, because the indictment did not charge, and the evidence did not establish, a violation of 18 U.S.C. § 371. We have already rejected this proposition. Thus, we need not reach the question of whether the evidence establishes the use of the mails for the purpose of effectuating a scheme to defraud Seminole. The convictions can be affirmed if the evidence establishes the use of the mails in effectuating a scheme to defraud the United States by "impeding, impairing, obstructing and defeating the lawful function of the [REA] in its administration and enforcement of its guaranteed loan program" as charged in counts II through V. In other words, the mail fraud convictions should be affirmed if the evidence establishes the use of the mails in connection with the section 371 violation alleged in count I.

Appellants do not contend that the mailings referred to in counts II through V did not occur. Nor is it argued that these mailings were not made in connection with the transactions which support their convictions on count I of the indictment. In order for the mail fraud convictions to stand, it must be shown that the use of the mail played an "integral" role in the scheme. *See United States v. Bosby*, 675 F.2d 1174, 1183 (11th Cir. 1982) (*citing United States v. Bethea*, 672 F.2d 407, 410, (5th Cir. 1982)). The government contends that the mailings played an integral role in the scheme by tending to create an "aura of legitamacy,"

see Bosby, 675 F.2d at 1183, around the transactions. We agree. Consequently, we affirm Conover's convictions on counts II through V, and Tanner's convictions on counts II, IV, and V.

V

Lastly, appellants argue that the district court made a number of erroneous evidentiary rulings. First, appellants point to seventeen instances in which the district court excluded evidence tending to prove that the materials supplied by Tanner were adequate and reasonably priced. We fail to see the relevancy of this evidence. The government's case was based on allegations of commercial bribery and bid-rigging; whether Seminole received a good bargain as a result of this conduct simply has no bearing on whether these activities actually occurred. The district court did not err in excluding this evidence.

Appellants next contend that the district court improperly limited their cross-examination of government witness Albert Guthrie. During the cross-examination of Guthrie, the defense brought out that Guthrie was being investigated for criminal tax fraud, that was testifying under a grant of use immunity and that he was testifying pursuant to a court order. Guthrie also stated that in his opinion, he would not be prosecuted for tax fraud because he agreed to testify. Guthrie denied that he was under investigation for anything else, and denied that he had told anyone that he was under investigation for anything else. Appellants argue that the district court abused its discretion in not permitting defense counsel to continue to interrogate Guthrie concerning other investigations. We disagree. Guthrie had already denied having knowledge

of any other investigation. Moreover, the district court had already permitted a wide range of cross-examination concerning Guthrie's promise of use immunity. The district court's ruling did not constitute an abuse of discretion.

Appellants' last contentions concerns the testimony of Donald Gilbert, a private investigator who had been hired to investigate the relation between Tanner and Conover. The district court permitted Gilbert to testify that after making his investigation, he concluded that there was "collusion" between Conover and Tanner. In light of the context in which this statement was made, the length of the trial, and the other evidence supporting the conclusion that there was collusion between Tanner and Conover, we conclude that the error, if any, in the admission of this testimony was harmless. *See* FED.R.CRIM.P. 52(a).

VI

For the reasons set forth above, the convictions are affirmed.

AFFIRMED.

JAMES C. HILL, Circuit Judge, specially concurring:

Although I do not believe 18 U.S.C. § 371 should be construed to penalize the conspiracy proved in this case, I concur in the judgment of the court because this panel is bound by the decision of the Fifth Circuit in *United States v. Burgin*, 621 F.2d 1352 (5th Cir.), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980), which is inconsistent with the views I express below.

Section 371 criminalizes conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose." It does not criminalize a conspiracy to defraud a private party. The evidence in this case was sufficient to prove that the defendants conspired to defraud Seminole Electric. In my view, however, the prosecution did not prove a conspiracy to defraud the government of the United States.

It has long been the case that the prosecution need not show any monetary or property loss to the federal government to sustain a conviction for conspiracy to defraud the United States under section 371. *Haas v. Henkel*, 216 U.S. 462, 479, 30 S.Ct. 249, 253, 54 L.Ed. 569 (1910). In *Hammerschmidt v. United States*, 265 U.S. 182, 44 S.Ct. 511, 68 L.Ed. 968 (1924), the Supreme Court announced that to prove a violation of section 371, "[i]t is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention." 265 U.S. at 188, 44 S.Ct. at 512. More recently, the Court reiterated that the statutory language reaches "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." *Dennis v. United States*, 384 U.S. 855, 861, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966) (quoting *Haas v. Henkel*, 216 U.S. at 479, 30 S.Ct. at 254). No Supreme Court decision has upheld a conviction under section 371, however, where the defendants neither defrauded the federal government of its funds or property nor interfered with United States

government officials or their agents performing an official function of the federal government.

As the court's opinion in this case notes, Seminole Electric was the recipient of a loan made by one federal government agency and guaranteed by another. Moreover, as would be expected in any such lending arrangement, the federal government was entitled to exercise a significant degree of control over the means by which the funds it was providing would be utilized. Intellectual honesty compels me to find those facts sufficient to bring the fraud committed in this case within the ambit of section 371, as that statute was construed by the Fifth Circuit in *Burgin v. United States*, 621 F.2d 1352. In *Burgin* the government proved that the defendants, who included a state senator, conspired to use the senator's position in state government to exert undue influence upon officials of the state agency responsible for administering a Head Start training program in that state. The court quite aptly described the scheme designed and executed by the defendants as "influence peddling of the rankest kind." The federal government provided 75% of the funding for the state contracts that were improperly sought and retained by the defendants in that case, and the United States Department of Health, Education and Welfare apparently was entitled to approve the proposals that were later reduced to contracts between the state and the company the conspirators were seeking to benefit. Although the defendants did not conspire to exert any influence whatsoever, undue or otherwise, upon the federal government, and no pecuniary loss to the government was shown, the court nonetheless upheld their conviction under section 371 for conspiracy to defraud the United States.

According to the court's opinion in *Burgin*, "[t]he indictment in this case charged overreaching of an agent of the United States by a public official having a financial quid pro quo interest in a federally financed contract." 621 F.2d at 1357. Of course, where a state or private party is simply acting as an agent of the United States government in the implementation of a truly federal program, a fraud upon the agent may constitute a fraud upon the United States. But in my view, the courts should not generally find such an agency relationship in the absence of compelling evidence that the state or private party was in fact defrauded while acting as a mere agent of the federal government performing a constitutionally legitimate and duly authorized function of the federal government, rather than as a non-federal entity receiving some form of federal assistance. Complete ownership or control of a nominally private entity by the federal government might serve as evidence of such a relationship. *See United States v. Walter*, 263 U.S. 15, 18, 44 S.Ct. 10, 11, 68 L.Ed. 137 (1923) (holding statute reached conspiracy to defraud the United States Emergency Fleet Corp., of which the United States owned 100% of the stock, where "the contemplated fraud upon the corporation if successful would have resulted directly in a pecuniary loss to the United States, and even more immediately would have impaired the efficiency of its very important instrument"). Extensive federal regulation of the state or private entity's activities on behalf of the federal government would also tend to support a conviction under section 371 for committing a fraud most directly upon a private party, but indirectly upon the federal government as well. *See United States v. Gold*, 743 F.2d 800 (11th Cir.1984), *cert. denied*,

— U.S. —, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985), (upholding conviction for defrauding the United States in violation of section 371 by conspiring to file false Medicare claims with private intermediary that received, adjudicated and paid such claims under contract with federal government agency). Federal government assistance, however, accompanied by only a modicum of federal supervision of the non-federal entity's activities, seems patently insufficient to render a fraud upon that entity a fraud upon the United States.

By artful lawyering, one might easily blur the distinction between the United States government and those receiving its support beyond clear recognition. Courts must always remain mindful, however, of the admonition that penal statutes are to be strictly construed, a rule that is "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) (Marshall, C.J.). That well-known rule of construction is but a corollary to the comparably venerable "void for vagueness" doctrine of constitutional law. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). *See generally* Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 441-48 (1959). Thus it is essential that section 371 "plainly and unmistakably" proscribe the conduct of defendants before they are punished for its violation. *See United States v. Gradwell*, 243 U.S. 476, 485, 37 S.Ct. 407, 410, 61 L.Ed. 857

(1917); *United States v. Porter*, 591 F.2d 1048, 1055 (5th Cir.1979). Courts may necessarily find it difficult to formulate and apply a definition of "defraud," as that term is used in section 371, that men and women "of common intelligence" will easily understand. *See* Goldstein, *supra*, at 443. "The United States," however, is a term that need not be so broadly and mysteriously defined.

Appellants have defrauded Seminole Electric. Seminole Electric is neither an agency of the federal government nor its representative performing a duly authorized federal governmental function. Rather, under the Rural Electrification Act Congress has deliberately avoided undertaking the construction of rural power plants as a federal government enterprise. I have little doubt that Congress has an interest in "seeing that the entire project [receiving its aid] is administered honestly and efficiently and without corruption and waste." *United States v. Hay*, 527 F.2d 990, 998 (10th Cir.1975), *cert. denied*, 425 U.S. 935, 96 S.Ct. 1666, 48 L.Ed.2d 176 (1976). But in section 371 Congress obviously did not criminalize every conspiracy with the intent or effect of thwarting that objective. Congress has demonstrated well its ability to utilize the criminal law to protect its far-flung financial and other interests in non-federal programs or entities.[1]

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1. Chapter 47 of Title 18 of the United States Code, concerning fraud and false statements, provides a wide variety of examples. A general provision penalizes the knowing and willful making or use of false, fictitious or otherwise fraudulent statements "in any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. § 1001 (1982). Other federal statutes are more specific. It is a federal

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Because it has not done so here, section 371 should not be construed to reach appellants' acts.

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crime for any person to make "any false entry in any book, report, or statement of [any Federal Reserve bank, member bank, national bank or Federal Deposit Insurance Corporation (F.D.I.C.) insured bank] with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person." 18 U.S.C. § 1005 (1982). Another section criminalizes the making or passing of statements known to be false "for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Department." 18 U.S.C. § 1010 (1982). Federal law prescribes criminal penalties for knowingly making false statements for the purpose of influencing various actions of F.D.I.C. or Federal Savings and Loan Insurance Corporation insured institutions, 18 U.S.C. § 1014 (1982), and for knowingly making false statements "with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation." 18 U.S.C. § 1020 (1982).

SWORN STATEMENT

DANIEL MARTIN HARDY

PERSON INTERVIEWED: Daniel Martin Hardy.

DATE OF INTERVIEW: October 15, 1984.

PLACE OF INTERVIEW: Holiday Inn, Interstate 4, Plant City, Florida.

PERSONS PRESENT: Daniel Martin Hardy, O. Douglas Beard, Investigative Research, Inc., and Walter E. Taylor, Investigative Research, Inc.

INTERVIEWED BY: O. Douglas Beard, Investigative Research, Inc.

Mr. Beard: Mr. Hardy, I have explained to you that I am a private investigator. I've also explained to you that Mr. Taylor is a private investigator. I believe that you know my face from having seen me during the trial of Anthony Tanner that took place in Tampa, Florida, during February and March, 1984. Do you recognize my face, do you know who I am?

Mr. Hardy: Yes.

Mr. Beard: I'm sorry?

Mr. Hardy: Yes.

Mr. Beard: All right, Mr. Hardy, thank you, I appreciate your picking up your voice as much as you can so it can be clearly understood. Mr. Hardy, I've explained to you today that I am here at the request of Attorney David Best, who was Mr. Tanner's defense council. Do you understand that?

Mr. Hardy: Yes.

Mr. Beard: I have also explained to you that our conversation is being tape recorded at this moment. Do you understand that?

Mr. Hardy: Yes.

Mr. Beard: Do I have your permission to record our conversation?

Mr. Hardy: Yes.

Mr. Beard: All right. Mr. Hardy, I am a Notary Public in the State of Florida. Do you know what a Notary Public is?

Mr. Hardy: Yes.

Mr. Beard: Essentially, a Notary Public is empowered to swear individuals to their statements. Do you understand that?

Mr. Hardy: Yes.

Mr. Beard: Would you raise your right hand for me please, Mr. Hardy, Knowing that I am a Notary Public, do you swear to tell the truth and nothing but the truth?

Mr. Hardy: Yes.

Mr. Beard: All right. Mr. Hardy, I'd like to talk to you first about your most recent meeting with David Best in Crystal River, Florida. Do you recall such a meeting?

Mr. Hardy: Yes.

Mr. Beard: How did the meeting come about?

Mr. Hardy: I seen Mr. Best on the side of the road.

Mr. Beard: All right, can you be a little bit more specific? Did you just happen to be in Crystal River?

Mr. Hardy: Right.

Mr. Beard: All right. Were you there alone?

Mr. Hardy: No.

Mr. Beard: Who was with you?

Mr. Hardy: My wife and son.

Mr. Beard: Did you go to Crystal River to see David Best?

Mr. Hardy: No.

Mr. Beard: Do I understand you correctly that your seeing David Best initially was pure circumstance?

Mr. Hardy: Right.

Mr. Beard: You did not have an appointment?

Mr. Hardy: No.

Mr. Beard: Once you saw Mr. Best in Crystal River, did you make any attempts to personally speak with him?

Mr. Hardy: Yes.

Mr. Beard: When did the meeting occur?

Mr. Hardy: Saturday.

Mr. Beard: Are we talking about this past Saturday?

Mr. Hardy: Right.

Mr. Beard: So, it would have been two days ago, it would have been October the 13th, is that correct?

Mr. Hardy: Right.

Mr. Beard: Where did you talk with Mr. Best?

Mr. Hardy: In one of his homes.

Mr. Beard: Was this in Crystal River?

Mr. Hardy: Right.

Mr. Beard: What did you tell Mr. Best?

Mr. Hardy: I told Mr. Best that I had some things on my mind that had been bothering me a long time and I wanted to clear my conscience.

Mr. Beard: All right. What was David Best's reaction?

Mr. Hardy: He asked me if I wanted to come in the house.

Mr. Beard: Did you go in?

Mr. Hardy: Yes. Reluctantly, but I did.

Mr. Beard: Did you go in voluntarily?

Mr. Hardy: Right.

Mr. Beard: All right. What did you tell Mr. Best?

Mr. Hardy: I told Mr. Best that I felt like that the trial, the jury didn't, I told him a lot of things, but the main thing I . . .

Mr. Beard: Well, let's just, let's start kind of one thing at a time, if we can. Did you discuss with Mr. Best any specific thing relative to jury conduct that concerned you?

Mr. Hardy: Right. Yes.

Mr. Beard: What did you talk about, with regard to jury conduct?

Mr. Hardy: I told him that I felt like that the jury was on one big party.

Mr. Beard: All right. Mr. Hardy, let's back up just a moment. Were you a juror in the Anthony Tanner trial that took place in February and March, 1984?

Mr. Hardy: Yes.

Mr. Beard: Were you one of the jurors who ultimately rendered a verdict?

Mr. Hardy: Yes.

Mr. Beard: All right. Now, you told Mr. Best that you felt the jury was on one big party, is that correct?

Mr. Hardy: Right.

Mr. Beard: Why did you feel that way?

Mr. Hardy: Because the actions that were being conducted by the jurors.

Mr. Beard: All right. Specifically, with regard to the jurors, what do you mean?

Mr. Hardy: Well, we all just, we used to go out to lunch and drink alcohol.

Mr. Beard: All right, now you're talking about the regular noon recess during the trial?

Mr. Hardy: Right.

Mr. Beard: When you say we, let's be more specific. Who do you recall drinking alcohol during lunch?

Mr. Hardy: Three, the three other male jurors and three of the women.

Mr. Beard: All right, Mr. Hardy, is it your recollection that there were four male jurors, including yourself?

Mr. Hardy: Right.

Mr. Beard: Would you please describe for me, the other three male jurors, either by name or physical description.

Mr. Hardy: One of them was a transmission mechanic in St. Petersburg, I believe his name was John.

Mr. Beard: What did he look like?

Mr. Hardy: He was a relatively younger individual, as myself.

Mr. Beard: Did he have blond hair?

Mr. Hardy: Long, straight blond hair.

Mr. Beard: All right, go ahead.

Mr. Hardy: And the other one was Craig, which worked for GTE, he lived in Largo, and another guy, which owned a carpet cleaning business out of Bradenton, Florida.

Mr. Beard: Do you recall his name?

Mr. Hardy: No, I don't.

Mr. Beard: Do you recall what he physically looked like?

Mr. Hardy: Yes, I do.

Mr. Beard: Would you please describe him?

Mr. Hardy: He was about five foot seven, had black, about a hundred and eighty, sixty, seventy pounds, had black, grayish, curly hair.

Mr. Beard: All right. Now, I want to make sure I understand you correctly. Are you telling me that you,

John, Craig, and the carpet cleaner all consumed alcohol during the noon recess while the trial was going on?

Mr. Hardy: Yes.

Mr. Beard: All right. Now, how much alcohol are we talking about, Mr. Hardy?

Mr. Hardy: Anywhere from a pitcher to three pitchers, depending upon how we felt.

Mr. Beard: Three pitchers of what?

Mr. Hardy: Budweiser.

Mr. Beard: Did you all drink Budweiser?

Mr. Hardy: Yes.

Mr. Beard: Did you participate equally with regard to your drinking? Did all four of you drink the beer?

Mr. Hardy: Yeah, but we didn't participate equally, I think we didn't consume the same amount, some consumed more.

Mr. Beard: Who were the heavier drinkers in the group?

Mr. Hardy: The guy that owned the carpet cleaning store, and John, the guy that was a transmission mechanic that lived in St. Petersburg.

Mr. Beard: All right, it was your impression that the carpet cleaner and John from St. Petersburg consumed more than you and Craig?

Mr. Hardy: Right.

Mr. Beard: All right. Now, you mentioned earlier that there were three female jurors who also drank. Would you please describe for me who those three women were?

Mr. Hardy: Well, two of them I would have to see their face again to (UNINTELLIGBLE), it's been a long time. But one specifically, because I felt like to me as much as she consumed all the time, she had to be an alcoholic.

Mr. Beard: All right. Would you describe for me this lady who you would consider to be an alcoholic?

Mr. Hardy: About five foot two and two hundred pounds.

Mr. Beard: Did she, was she on the jury from the beginning?

Mr. Hardy: Yes.

Mr. Beard: Was she an alternate?

Mr. Hardy: Yes.

Mr. Beard: Did she ultimately get on the jury?

Mr. Hardy: Yes.

Mr. Beard: When did this happen?

Mr. Hardy: When Craig asked to be dismissed for vacation purposes.

Mr. Beard: All right. Who was the foreman of the jury?

Mr. Hardy: She was.

Mr. Beard: All right. When you say she, you mean the lady that you've just described who consumed a lot of alcohol?

Mr. Hardy: Yes.

Mr. Beard: All right. Now, Mr. Hardy, when we're talking about, or when you are talking about a quantity of alcohol, how much do you mean?

Mr. Hardy: A liter.

Mr. Beard: A liter of what?

Mr. Hardy: Wine.

Mr. Beard: How often did you go to lunch with the lady who ultimately ended up as the foreman of the jury?

Mr. Hardy: Three times.

Mr. Beard: Did you see her drink on each of those occasions?

Mr. Hardy: Yes, I did.

Mr. Beard: Did she drink the same amount on each occasion?

Mr. Hardy: Yes, she did. One time we seen them, we wasn't with them, we was in the same place, but we were at different tables, on about five or six other occasions.

Mr. Beard: All right. On each occasion that you accompanied this lady and on each occasion that you observed her, was she drinking wine?

Mr. Hardy: Yes.

Mr. Beard: Did she order the same quantity?

Mr. Hardy: Yes.

Mr. Beard: Was it a liter?

Mr. Hardy: Yes.

Mr. Beard: Did you observe her drink the liter?

Mr. Hardy: Yes. Mostly the two other women were given a mixed drink, maybe one or two a piece.

Mr. Beard: All right.

Mr. Hardy: I never seen more than two though.

Mr. Beard: Okay. Dan, have you had any contact with Anthony Tanner since the trial?

Mr. Hardy: No. I never had no contact with Anthony Tanner.

Mr. Beard: Have you had any contact with David Best, other than this Saturday meeting that you initiated?

Mr. Hardy: No.

Mr. Beard: Has anyone encouraged you to meet with Mr. Best?

Mr. Hardy: No.

Mr. Beard: All right. Mr. Hardy, I want to talk to you now about something we just discussed previously with regard to John, the young transmission mechanic who was a member of the jury. During the course of the trial, did you become aware that John was smoking marijuana?

Mr. Hardy: Yes, I did.

Mr. Beard: How did you become aware of that?

Mr. Hardy: When we went to lunch or after the trial we would sit around and talk and he would ask us did we want to smoke, burn one with him, smoke one with him.

Mr. Beard: All right. Now, let me stop for just a minute. When you say we, who are you talking about?

Mr. Hardy: All of the four male jurors.

Mr. Beard: Okay, and now we're talking specifically about John, do I understand you correctly that John offered you marijuana?

Mr. Hardy: Yes.

Mr. Beard: Did he offer Craig and the carpet cleaner marijuana?

Mr. Hardy: Yes, he did.

Mr. Beard: Did any of you either singly or together during the trial, smoke marijuana?

Mr. Hardy: They did. I did on one occasion.

Mr. Beard: All right. Now, when you say they, Mr. Hardy, are you talking about . . .

Mr. Hardy: The four male, the three other male jurors.

Mr. Beard: All right. Did you see the marijuana being smoked?

Mr. Hardy: Yes. I did.

Mr. Beard: Where did this happen? And let's talk about each separate instance separately, when is the first time during the trial that marijuana was made available to you by John?

Mr. Hardy: About the second week.

Mr. Beard: And how did it occur?

Mr. Hardy: We was at lunch talking, and just one thing led to another.

Mr. Beard: What did John say?

Mr. Hardy: He asked us did we party very much.

Mr. Beard: And what happened as a result of that?

Mr. Hardy: Everybody said yeah. And he asked us did we want to go burn one with him.

Mr. Beard: This was the second week of the trial?

Mr. Hardy: Right.

Mr. Beard: Do you recall where you were when this conversation took place?

Mr. Hardy: Yes.

Mr. Beard: Where?

Mr. Hardy: Franklin Mall, Franklin Street mall.

Mr. Beard: Specifically, what store?

Mr. Hardy: Well, I don't know what store, but we was standing out beside some sandwich shop, Fish and Chips, whatever, I can't specifically think of the name, but I know the place was we went there and went and got us, we went through and got Arthur Treacher's, I think that's what it is, Fish and Chips.

Mr. Beard: So, it was at that location that John first mentioned the availability of marijuana?

Mr. Hardy: Right.

Mr. Beard: Did he have marijuana with him that day to offer?

Mr. Hardy: Yes.

Mr. Beard: Where did you go to smoke it?

Mr. Hardy: To the parking garage.

Mr. Beard: What parking garage are you talking about?

Mr. Hardy: The City of Tampa.

Mr. Beard: Where is that located?

Mr. Hardy: Twigg Street.

Mr. Beard: What street?

Mr. Hardy: Twigg.

Mr. Beard: Twigg Street? Mr. Hardy, how did you happen to select that parking garage?

Mr. Hardy: We had to park there.

Mr. Beard: All right. This is where your cars were parked?

Mr. Hardy: Right.

Mr. Beard: Did John have to go to his car to get the marijuana?

Mr. Hardy: At first.

Mr. Beard: All right. Did you all four participate on that day?

Mr. Hardy: No.

Mr. Beard: All right. That was the first time, right?

Mr. Hardy: Right.

Mr. Beard: Who did participate?

Mr. Hardy: John and the guy from Bradenton.

Mr. Beard: All right, John and the guy from Bradenton? Can you be more specific about the guy from Bradenton? Who is that?

Mr. Hardy: He owned the carpet cleaning store, the carpet cleaning business.

Mr. Beard: All right. Did John give the juror from Bradenton and Craig the marijuana?

Mr. Hardy: Craig didn't smoke none the first time.

Mr. Beard: All right, it was just John and the man from Bradenton?

Mr. Hardy: Right.

Mr. Beard: Was the marijuana free or did you have to pay for it?

Mr. Hardy: It was free.

Mr. Beard: All right. How much marijuana was consumed on that first occasion?

Mr. Hardy: One cigarette.

Mr. Beard: And what happened after that was finished?

Mr. Hardy: We went back to the courthouse.

Mr. Beard: All right. Was that marijuana consumed after the four of you had been drinking beer?

Mr. Hardy: Yes, it was.

Mr. Beard: Okay. Mr. Hardy . . .

Mr. Hardy: No, it wasn't, I'm sorry, we didn't drink none that day. I'm sorry, we didn't, we didn't drink none that day. We didn't have time.

Mr. Beard: Okay. All right. When is the second time that you can recall marijuana being offered?

Mr. Hardy: The next day.

Mr. Beard: Who offered marijuana?

Mr. Hardy: John.

Mr. Beard: How did it, how did the subject come up?

Mr. Hardy: He asked us did we want to go to smoke one with him again while we were at the Hyatt Regency Hotel.

Mr. Beard: Was this during lunch?

Mr. Hardy: Right.

Mr. Beard: Had you consumed any alcohol at the Hyatt Regency?

Mr. Hardy: Yes, we had.

Mr. Beard: How much?

Mr. Hardy: One pitcher.

Mr. Beard: One pitcher between the four of you?

Mr. Hardy: Four of us, yes.

Mr. Beard: All right. Did you or any of the group then go and smoke marijuana?

Mr. Hardy: Yes, we all did.

Mr. Beard: All right, where did you go?

Mr. Hardy: To the parking garage.

Mr. Beard: Did John have the marijuana in his car?

Mr. Hardy: Yes.

Mr. Beard: Did he offer it free?

Mr. Hardy: Yes, he did.

Mr. Beard: How much marijuana was consumed?

Mr. Hardy: One cigarette.

Mr. Beard: Where did you go after you finished?

Mr. Hardy: Back to the courthouse.

Mr. Beard: When is the third time that you can recall marijuana being offered?

Mr. Hardy: The next day. This was a frequent occasion.

Mr. Beard: All right. This was a frequent occasion? Okay, to avoid repeating this, Mr. Hardy, did John always keep the marijuana in his car?

Mr. Hardy: The first week he did, then he started taking it with him 'cause we didn't want to have to walk to the parking garage anymore.

Mr. Beard: So, Mr. Hardy had the marijuana with him in the courtroom?

Mr. Hardy: Right.

Mr. Beard: Where did the four of you go to smoke marijuana after that?

Mr. Hardy: Down past the Hyatt Regency.

Mr. Beard: Specifically, where?

Mr. Hardy: I don't know the road, it was past the hotel on the other side.

Mr. Beard: Was it a quiet place?

Mr. Hardy: Yeah, away from everybody.

Mr. Beard: Mr. Hardy, how often did this occur during the course of the trial, with regard to smoking marijuana?

Mr. Hardy: Just about every day except on maybe three or four occasions, five or six occasions, maybe, I would say when me and Craig didn't go with them.

Mr. Beard: All right, so, this began during the second week of trial, went through the entire trial, is that correct?

Mr. Hardy: Right.

Mr. Beard: With the exception of five or six occasions when you and Craig did not participate?

Mr. Hardy: Right, we were scared.

Mr. Beard: You were scared?

Mr. Hardy: Right.

Mr. Beard: Okay. Mr. Hardy, did there come a time during your association with the juror who we've identified as John, that you became aware that John was injesting cocaine during the noon hour?

Mr. Hardy: Yes.

Mr. Beard: Would you tell me about that please, sir?

Mr. Hardy: Well, he asked us did we want any toot.

Mr. Beard: Did you want any toot?

Mr. Hardy: Right. When we found that out we didn't have too much to do with him no more.

Mr. Beard: All right. Mr. Hardy, did you, at any time, see John injest cocaine?

Mr. Hardy: Yes, sir.

Mr. Beard: Would you explain that to me, when it occurred and where it occurred?

Mr. Hardy: At lunch, at the parking garage, in his car.

Mr. Beard: All right. Was there anyone present besides you and John?

Mr. Hardy: Yes. All three of the other, all four male jurors were there.

Mr. Beard: How much cocaine was injested by John?

Mr. Hardy: A pretty good bit, I would say. Of course I don't know too much about it.

Mr. Beard: Did John offer cocaine to any of the rest of you?

Mr. Hardy: Yeah, all of us.

Mr. Beard: Did anyone else participate?

Mr. Hardy: Yes, the guy from Bradenton that owned the carpet cleaning business.

Mr. Beard: Did John offer cocaine free of charge or was he selling it?

Mr. Hardy: Both.

Mr. Beard: Can you be more specific with me?

Mr. Hardy: Well, he offered it free of charge, he offered it to us free of charge on the occasions when we

were there, then he wanted to know did we want to buy any of it, plus he wanted to know did we want any marijuana too, and some did, was sold, I never seen it, but I heard him talk about it.

Mr. Beard: You heard who talking about it?

Mr. Hardy: John and the guy from the carpet cleaning store, he wanted to know if he wanted to buy a quarter pound.

Mr. Beard: To your knowledge . . .

Mr. Hardy: No, the guy asked him did he have, did he know where he could get a quarter of a pound.

Mr. Beard: Who is the guy?

Mr. Hardy: The guy from the carpet cleaning store in Bradenton, the carpet cleaning business.

Mr. Beard: All right. Do I understand you correctly that the juror from Bradenton, who owned the carpet cleaning business, inquired of John, also another juror, as to where he, meaning the carpet cleaner, could buy marijuana?

Mr. Hardy: Right.

Mr. Beard: And what did John tell him?

Mr. Hardy: He had it.

Mr. Beard: Did John tell the carpet cleaner that he would sell him marijuana?

Mr. Hardy: Yes, he did.

Mr. Beard: All right. How much did you observe the carpet cleaner injest, with regard to the cocaine?

Mr. Hardy: I would say a couple lines.

Mr. Beard: A couple of lines? What do you mean by a line, Mr. Hardy?

Mr. Hardy: Well, they would get a razor blade and chop it up and then make lines out of it.

Mr. Beard: Can you explain to me physically what we're talking about? When you say they, do you mean John and the carpet cleaner?

Mr. Hardy: John and the carpet cleaner.

Mr. Beard: Where was this done?

Mr. Hardy: In the parking garage.

Mr. Beard: Was it done in the car?

Mr. Hardy: Right.

Mr. Beard: What kind of a car does John drive?

Mr. Hardy: He drives a Gremlin.

Mr. Beard: What color is it?

Mr. Hardy: Brown.

Mr. Beard: Where did he keep the narcotics?

Mr. Hardy: In his glove compartment.

Mr. Beard: How were the narcotics packaged, and when we're talking about packaging, talk first about the marijuana, second about the cocaine. How was the marijuana packaged?

Mr. Hardy: It was in a, he kept it like, I would say a prescription bottle.

Mr. Beard: Was there a lot of marijuana?

Mr. Hardy: Just four or five things, maybe, he got four or five cigarettes out of it.

Mr. Beard: All right. With regard to the cocaine, how was that packaged?

Mr. Hardy: Well, he had it in a bag, you know, in a couple of thin, then later on he would bring a contraption that he had, I guess his wife called it, it had a bottle that you would screw onto the top of it and he would turn a handle on it down, and turn it upside down and that would fill up, would fill up, I don't know how to say it, it would fill up a compartment in it, then he would turn it up and then he would stick it up to his nose and suck on it or hit it, or whatever, up his nose.

Mr. Beard: Did you see John physically perform that function on any occasion?

Mr. Hardy: Yes, I did.

Mr. Beard: How many times?

Mr. Hardy: I'd say about five.

Mr. Beard: How many of those five times occurred during the Anthony Tanner trial?

Mr. Hardy: All of them. The only time I'm talking about is when it occurred on the Anthony Tanner trial at lunch time. It was done too, after the trial was over.

Mr. Beard: All right, for right now, let's stick specifically to the lunch hour. Did you ever become aware that the carpet cleaner from Bradenton was participating in the cocaine injestion as well?

Mr. Hardy: Yes.

Mr. Beard: How often did you see that carpet cleaner injest cocaine?

Mr. Hardy: Two or three times.

Mr. Beard: Where did the injestion take place?

Mr. Hardy: At the garage, parking garage.

Mr. Beard: All right, Mr. Hardy, explain to me if you would, what happened once John took the cocaine out of the glove compartment. Where did he put it and how did he cut it?

Mr. Hardy: He put it on a mirror and took a razor blade and chopped it up.

Mr. Beard: Where did he get the mirror?

Mr. Hardy: Out of his glove compartment.

Mr. Beard: Did he do it inside of the car or outside?

Mr. Hardy: Inside.

Mr. Beard: Did he divide the cocaine equally?

Mr. Hardy: No. He did more than what the guy from the carpet cleaning business did.

Mr. Beard: All right. Mr. Hardy, was there ever an occasion that the carpet cleaner from Bradenton and John, the young man on the jury, injested cocaine after the four of you had been consuming alcohol?

Mr. Hardy: Yes.

Mr. Beard: Was it frequent or infrequent?

Mr. Hardy: It was frequent, most of the time we went to lunch and ate and got us a beer and then we left to go to the parking garage.

Mr. Beard: All right. When you say ate and got us a beer, are you talking about one beer or pitchers of beer?

Mr. Hardy: Pitchers of beer.

Mr. Beard: So, after you consumed the pitchers of beer, John and, on occasion, the carpet cleaner member of the jury, injested cocaine, is that correct?

Mr. Hardy: That's right.

Mr. Beard: Were there occasions when all three things were done? Alcohol, marijuana, and cocaine?

Mr. Hardy: Yes, there was.

Mr. Beard: Mr. Hardy, were you able to discern a change of attitude, a change in physical alertness, or anything along those lines, with regard to John, the young man on the jury, after he drank and injested either marijuana or cocaine?

Mr. Hardy: Yeah, John just talked about how he was flying.

Mr. Beard: All right. What did he mean by that, in your opinion?

Mr. Hardy: Flying? I guess he was messed up.

Mr. Beard: Did John show any physical signs that were obvious to you?

Mr. Hardy: To me, yes, maybe not to a normal person.

Mr. Beard: What kind of signs?

Mr. Hardy: Well, he just, he'd stutter a little bit, you know, I know that they was falling asleep all the time during the trial.

Mr. Beard: When you say they, who are you talking about?

Mr. Hardy: Most, some of the jurors. Like John and the guy from the carpet cleaning store.

Mr. Beard: All right. Mr. Hardy, to your knowledge, did Craig ever take part in the cocaine injestion?

Mr. Hardy: No, he didn't.

Mr. Beard: Did you?

Mr. Hardy: No, I didn't. We didn't want to let them find out that, we didn't really, once we seen that, we didn't really want to get involved in that. Like I said, we were scared, we were scared that we was going to get in trouble and we really didn't want to have too much more to do with it after that. This went on about through the middle of the trial.

Mr. Beard: All right. Mr. Hardy, have you had any contact with any of the prosecutors since the verdict was rendered?

Mr. Hardy: Yes, I have.

Mr. Beard: Who initiated that contact?

Mr. Hardy: I, myself.

Mr. Beard: Who did you call?

Mr. Hardy: Mr. Runyon.

Mr. Beard: And what did you talk about?

Mr. Hardy: We talked about the alcohol consumption.

Mr. Beard: What did you tell Mr. Runyon?

Mr. Hardy: I told Mr. Runyon that we would just go out and get us a pitcher of beer and drink it, but as far as us being drunk, no we wasn't.

Mr. Beard: Did you tell Mr. Runyon about the marijuana?

Mr. Hardy: No, I didn't.

Mr. Beard: Did you tell Mr. Runyon about the cocaine?

Mr. Hardy: No, I didn't.

Mr. Beard: Mr. Hardy, you have expressed to me today this subject is not an easy one for you to discuss, is that correct?

Mr. Hardy: Right, I feel like I'm putting my family on the line.

Mr. Beard: Mr. Hardy, why are you talking to me and Mr. Taylor today?

Mr. Hardy: Because I felt like that the people on the jury didn't have no business being on the jury. I felt like that Mr. Tanner should have a better opportunity to get somebody that would review the facts right, that were able to review the facts.

Mr. Beard: Mr. Hardy, I want to make sure I understand you perfectly . . .

Mr. Beard: Mr. Hardy, we have switched to side 2 of this tape, and I asked you before we turned the tape over what motivated you to come forward? I want to make sure I understand you clearly. Are you telling me that your motivated by conscience?

Mr. Hardy: Right. I wanted to clear my conscience.

Mr. Beard: Is there anything else that motivated you, Mr. Hardy?

Mr. Hardy: No.

Mr. Beard: Has anybody offered you anything of value?

Mr. Hardy: No.

Mr. Beard: Has Mr. Tanner had any contact with you and encouraged you to come forward?

Mr. Hardy: No. The only time I ever seen Mr. Tanner was at the trial.

Mr. Beard: Has Mr. Best had any contact with you and encouraged you to come forward?

Mr. Hardy: No, he hasn't.

Mr. Beard: All right. When I say contact, I mean other than your most recent Saturday contact?

Mr. Hardy: Right.

Mr. Beard: Has Mr. Best offered you anything to come forward?

Mr. Hardy: No.

Mr. Beard: Have Mr. Taylor or I offered you anything of value to come forward?

Mr. Hardy: No.

Mr. Beard: Dan, a few minutes ago while we were talking, I asked you to restrict your comments to activities involving the jurors that took place during the noon hour, now I'd like to talk to you briefly about any activities that took place other than the noon hour. Were there occasions when you got together with other male or female jurors and participated in the use of marijuana or other drugs after the trial was completed for the day?

Mr. Hardy: Yes. I didn't, not, I never participated after, but it was done, I was there.

Mr. Beard: Tell me about those times.

Mr. Hardy: A couple times we went to the Sheraton, couple times we went to the Hyatt Regency and we just sit talk about the trial and you know, just like friends getting together.

Mr. Beard: All right. Mr. Hardy, when you say that you sat around and talked about the trial, do you recall the admonishment that Judge Crimsmon gave you and the other jurors during the trial, and when I say gave it to you, I mean gave it to you every time before you left the jury box at lunch and at the end of the day and specifically, with regard to not discussing the case even among yourselves?

Mr. Hardy: Yes, I do.

Mr. Beard: Did you have occasions to discuss that admonishment with other jurors?

Mr. Hardy: Yes, we did.

Mr. Beard: What was the attitude?

Mr. Hardy: They can't prove nothing.

Mr. Beard: Did members of the jury, in fact, discuss the evidence routinely?

Mr. Hardy: Yes, they did.

Mr. Beard: When I say routinely . . .

Mr. Hardy: That was mostly the topic of the conversation.

Mr. Beard: Did you talk about it on a daily basis?

Mr. Hardy: Yes, we did.

Mr. Beard: Were there times when the entire jury got together for lunch and the subject of the trial was discussed?

Mr. Hardy: Yeah, but not the entire jury, I mean not everybody, there was a few of the older women that went their own ways.

Mr. Beard: All right.

Mr. Hardy: A couple of them, they were straight down the line.

Mr. Beard: What do you mean by that, Mr. Hardy?

Mr. Hardy: Well, they were sticking to what we was supposed to be done.

Mr. Beard: All right. Mr. Hardy, during the course of the trial, did you become aware that the young blond juror by the name of John was using cocaine during the breaks in the trial?

Mr. Hardy: I felt like he was, I never seen him, but I knew he had that little contraption and he was going to the bathroom and come back down sniffing.

Mr. Beard: What do you mean come back out sniffing?

Mr. Hardy: Well, he'd sniffing, you know, you know, you know, like he got a cold, it would always seem like always had a cold.

Mr. Beard: All right. Mr. Hardy, during the course of the trial, did you learn that the young blond juror by the name of John had, in fact, sold a quarter of pound of marijuana to the juror who was a carpet cleaner from Bradenton?

Mr. Hardy: Yes, I did.

Mr. Beard: How did you learn about that?

Mr. Hardy: 'Cause he talked about it at lunch and he went to his, he was supposed to meet him in, at his house in St. Pete to pick it up.

Mr. Beard: Did you actually hear this conversation?

Mr. Hardy: Yes, I did.

Mr. Beard: Was there anyone else present?

Mr. Hardy: Yes, there was.

Mr. Beard: Who?

Mr. Hardy: Craig.

Mr. Beard: Did John provide the carpet cleaner from Bradenton with his home address?

Mr. Hardy: Yes, he did.

Mr. Beard: Did you see him do that?

Mr. Hardy: Yes, I did, telephone number too.

Mr. Beard: Was there discussion of price with regard to this quarter pound or marijuana?

Mr. Hardy: Yes, there was.

Mr. Beard: How much?

Mr. Hardy: Two hundred and fifty dollars.

Mr. Beard: Was there discussion of price with regard to cocaine at any time?

Mr. Hardy: Yes, there was.

Mr. Beard: Can you explain to me how that came about and what was discussed?

Mr. Hardy: He wanted to know if we wanted any cocaine, he said that he had an ounce of it and he would sell it to us for eighty dollars a gram.

Mr. Beard: Eighty dollars a gram?

Mr. Hardy: Right.

Mr. Beard: Who was offering the cocaine for sale?

Mr. Hardy: John.

Mr. Beard: When did these conversations take place?

Mr. Hardy: During the lunch hour and after the break of the day.

Mr. Beard: Mr. Hardy, to your knowledge, do any of the female jurors who were on the Tanner jury, have any knowledge concerning marijuana or cocaine?

Mr. Hardy: No.

Mr. Beard: Essentially, they know nothing about it as far as you know?

Mr. Hardy: Right.

Mr. Beard: All right. Mr. Hardy, during the course of the Tanner trial, and specifically during lunch, did the four male jurors have discussions about cocaine in general and the various methods that it could be used?

Mr. Hardy: Yes, we did.

Mr. Beard: Explain to me about that.

Mr. Hardy: John used to talk, he was trying to explain to the carpet cleaning guy how to freebase it.

Mr. Beard: What does freebasing mean?

Mr. Hardy: I don't know, just from what I got from them, from the conversations was that they smoked it. That you would smoke it, and cocaine is supposed to be cut and you have to cook it down, or whatever to do with it to be able to get the cut so you can get the pure cocaine out, that's what I got from the conversation.

Mr. Beard: Mr. Hardy, in your discussions or your dealings with John, the young juror, blond juror, did you ever observe any other method of injesting cocaine that John used?

Mr. Hardy: Yeah, he have like, of a sandwich bag that the corner was pulled off of it and it had a metal tie that would be wrapped around he would keep that and little straw and a razor blade inside of a Sucrets package.

Mr. Beard: All right, let me talk to you about that more specifically. Are we talking about a regular straw that he would put up to his nose?

Mr. Hardy: Right.

Mr. Beard: All right. Now, what were the other pieces of equipment?

Mr. Hardy: A razor blade.

Mr. Beard: A razor blade? Where was the razor kept?

Mr. Hardy: Inside the pack, inside the metal cases that you'd buy Sucrets, I remember that, it was that you would buy Sucrets throat lozenges with.

Mr. Beard: All right. So, it was a small flat case? What else was inside that Sucrets case?

Mr. Hardy: The cocaine too.

Mr. Beard: All right. What was the cocaine kept in?

Mr. Hardy: A sandwich baggie with the corner of the sandwich baggie.

Mr. Beard: Mr. Hardy, I have no further questions for you. Is there anything that you would like to add, other than what we've already discussed?

Mr. Hardy: I would come forward a long time ago, but I was scared because this is serious allegations being made and that I didn't want to get involved, I was scared of losing my job and putting my family on the line and so I just felt like that I should leave things alone and keep my mouth shut and go on about my life, go on with my life.

Mr. Beard: Mr. Hardy, we've identified one of the male jurors as a carpet cleaner from Brandenton. Do you recall anything about his name?

Hr. Hardy: Yes, I do.

Mr. Beard: What?

Mr. Hardy: His first name is Pat.

Mr. Beard: All right. Mr. Hardy, I've got one final question for you. During the period of time that you participated with the other male jurors in the consumption of beer and in the use of marijuana, do you feel that the combination of that usage affected your reasoning ability during the trial?

Mr. Hardy: Yes. That one day.

Mr. Beard: All right, when you say yes that one day, are you telling me there was only one day that you consumed both alcohol and marijuana?

Mr. Hardy: Marijuana, I consumed alcohol all the time.

Mr. Beard: All right. Was there only one day that you did both?

Mr. Hardy: Right. Yes, that was in the middle of the trial.

Mr. Beard: All right. Mr. Hardy, anything else you'd like to add?

Mr. Hardy: No.

Mr. Beard: All right, thank you, sir.

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

BEFORE ME, the undersigned authority, personally appeared DANIEL MARTIN HARDY, who, after being

duly sworn, deposes and says that he has read the above and foregoing statement consisiting of thirty (30) pages, tht he has personal knowledge of the facts and matters set forth therein, and that the statement is true and correct to the best of his knowledge.

/s/ DANIEL MARTIN HARDY

Sworn to and subscribed before me, this 17 day of October, A.D., 1984.

O. Douglas Beard
Notary Public, State of Florida at Large
NOTARY PUBLIC, State of Florida at Large

My Commission Expires July 13, 1985

Bonded by LAWYERS SURETY CORPORATION
My Commission Expires:

Supreme Court, U.S.
FILED
OCT 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-177

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANTHONY R. TANNER AND WILLIAM M. CONOVER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the district court violated petitioners' Sixth Amendment right to trial by an impartial jury by denying, without an evidentiary hearing, their motion for a new trial based on allegations of juror intoxication.

2. Whether 18 U.S.C. 371, which makes unlawful a conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose," applies to an agreement to defraud a corporation of monies borrowed from one federal agency and guaranteed by another federal agency.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-22) is reported at 772 F.2d 765.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1985. A petition for rehearing was denied on June 26, 1986 (Pet. App. 1-2). The petition for a writ of certiorari was filed on August 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial before the United States District Court for the Middle District of Florida, petitioners were convicted of conspiracy to defraud the government in violation of 18 U.S.C. 371 (Count One). Petitioner Conover was

also convicted on four mail fraud counts, in violation of 18 U.S.C. 1341 (Counts Two through Five). Petitioner Tanner was convicted on three of the mail fraud counts (Counts Two, Four, and Five).[1] Pet. App. 8. Each petitioner was sentenced to concurrent 18-month terms of imprisonment on each count. Petitioner Tanner was also fined $10,000.

1. At trial, the government established that petitioners defrauded the Seminole Electric Cooperative, Inc. (Seminole) when petitioner Conover, who was Seminole's procurement manager, assisted petitioner Tanner in his efforts to secure two contracts from Seminole for the construction of an access road (Pet. App. 3-8). Conover tailored the specifications for the two contracts, which were to be awarded on the basis of competitive bidding, to ensure that Tanner would be the lowest bidder (*id.* at 6-7). In exchange, Tanner assisted Conover in several financial endeavors; Tanner lent Conover money to enable him to purchase a condominium owned by one of Tanner's companies; and Tanner arranged for Conover to be awarded contracts to manage and perform landscaping work at the condominium complex (*id.* at 5-6). Monies that Seminole used to fund the contracts awarded to Tanner were part of a total of $1.1 billion in federal loan funds. The federal funds had been borrowed from the Federal Financing Bank, an agency of the United States Treasury, and the loan was guaranteed by the Rural Electrification Administration (REA), an agency of the United States Department of Agriculture. The purpose of the loan was to enable Seminole to build a coal-fired power plant near Palatka, Florida (*id.* at 3-4). The access road was needed for the construction of transmission lines for the power plant (*id.* at 4).

[1]Petitioner Tanner was acquitted on Count Three (Pet. App. 13 n.2). An earlier trial of both petitioners resulted in a mistrial because the jury was unable to reach a verdict (*id.* at 8).

2. After their conviction, but prior to sentencing, petitioners moved for an order permitting them to interview jurors, in order to explore an allegation of juror misconduct (Pet. App. 9).[2] By affidavit, petitioner Tanner's counsel alleged that he had received an unsolicited telephone call from a juror who claimed that several jurors had been drinking during the luncheon recesses and had fallen asleep during the trial (*ibid.*). The district court held a hearing on petitioners' motion and subsequently denied the motion.

While this case was on appeal, petitioners filed a second motion for a new trial based on new allegations of jury misconduct made by a second juror who had contacted petitioner Tanner's counsel (Pet. App. 9). The juror alleged that several jurors, including himself, drank beer and smoked marijuana during the luncheon recesses (*id.* at 9, 27, 29, 31-33, 37-39). He also alleged that two jurors had occasionally ingested cocaine during the noon recess (*id.* at 9, 39, 41-44, 50-51). The juror stated that the drinking and drug use had affected his ability to reason during one day in the middle of the trial (*id.* at 55) and that he thought that the two principal drug users had fallen asleep during the trial (*id.* at 46). The district court denied the motion for a new trial (*id.* at 9).

3. On appeal, petitioners challenged, inter alia, the district court's refusal to conduct an evidentiary hearing on their motion for a new trial based on alleged juror misconduct (Pet. App. 8). Petitioners also claimed that the indictment did not charge, and the evidence did not prove, a conspiracy to defraud the government within the meaning of 18 U.S.C. 371 (Pet. App. 10). The court of appeals rejected both claims (*id.* at 3-16).

[2]Under Local Rule 2.04(c) of the Middle District of Florida, attorneys are barred from contacting jurors unless they move for an order permitting such an interview. Unless good cause is shown, any such motion must be made within ten days after the verdict and must specify the names and addresses of the persons the attorney wishes to interview.

ARGUMENT

1. Petitioners contend (Pet. 7-11) that the district court should have held an evidentiary hearing to consider their allegation that jurors abused alcohol and drugs during the trial. The failure to hold such a hearing, they claim, violated their Sixth Amendment right to trial by an impartial jury.

The court of appeals correctly concluded that the Sixth Amendment did not require the trial court to hold an evidentiary hearing prior to denying petitioners' motion for a new trial. The Sixth Amendment does not require that a trial court hold an evidentiary hearing in response to every allegation of jury misconduct. Rather, the need for an evidentiary hearing turns on the nature of the allegation made in a particular case. When, for example, the allegation suggests that the juror was exposed to potentially prejudicial extrinsic influence, the Sixth Amendment normally requires that a trial court hold an evidentiary hearing to consider the allegation. See *Smith* v. *Phillips*, 455 U.S. 209 (1982); *Remmer* v. *United States*, 347 U.S. 227 (1954). The traditional presumption against post-verdict inquiry into jury deliberations is overcome in that circumstance by a presumption of prejudice to the defendant's right to an impartial jury. Substantial claims of juror partiality due to extrinsic influence are by their nature susceptible to meaningful exploration and evaluation only through an evidentiary hearing.

As the court of appeals properly recognized, however, the Sixth Amendment does not automatically require an evidentiary hearing in a case, such as this one, where the allegations of juror misconduct concern intrinsic sources of influence bearing on jury competence during the trial. To be sure, as the authorities cited by petitioners suggest (Pet. 8-11), a defendant has a right to a mentally competent jury, and it is permissible for a court to hold an evidentiary hearing to consider allegations of juror incompetence if the

court concludes that there is substantial risk that the defendant was deprived of that right. Because that inquiry involves considerations internal to the jury process, however, courts have required an especially strong showing of incompetence prior to ordering a post-verdict inquiry. See, *e.g.*, *Government of Virgin Islands* v. *Nicholas*, 759 F.2d 1073, 1077-1081 (3d Cir. 1985); *United States* v. *Barshov*, 733 F.2d 842, 851 (11th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *Sullivan* v. *Fogg*, 613 F.2d 465, 467 (2d Cir. 1980); *United States* v. *Dioguardi*, 492 F.2d 70, 78-80 (2d Cir.), cert. denied, 419 U.S. 829 (1974). Moreover, because an evidentiary hearing is not indispensable to the court's evaluation of certain types of allegations of juror incompetence, the Sixth Amendment does not mandate a hearing in those cases.

Unlike juror partiality, which tends to express itself only during jury deliberations and, hence, outside the presence of the trial judge, juror competence is often reflected in jury behavior that is observable during the trial. Consequently, the trial judge can often evaluate the force of the allegations based on his own observation of the jury during the trial. See *United States* v. *Dioguardi*, 492 F.2d at 81. As long as the allegations of intrinsic influence are susceptible to such a meaningful, independent judicial evaluation, the Sixth Amendment requires no more.

In this case, the allegations of juror misconduct concern matters of jury inattentiveness due to intoxication.[3] Juror

---

[3]Although the allegations of juror misconduct describe in detail the activities of several jurors, they conclude only that the reasoning ability of the juror making the accusations was adversely affected one afternoon during the trial (not during the deliberations) (Pet. App. 55), and that some of the jurors' abuse of alcohol and drugs caused them to "fall[] asleep all the time during the trial" (*id.* at 46). As discussed in the text, the latter allegation was subject to independent evaluation by the trial judge who observed the jurors during the trial, and who from his observations concluded that the jurors had not fallen asleep (see Pet. 4).

inattentiveness, if it occurred, is often reflected in jury behavior in the courtroom during the trial. Indeed, the allegations upon which petitioners rely specifically state that several jurors were inattentive and slept during the trial (see note 3, *supra*). Such allegations are particularly susceptible to meaningful evaluation by a trial judge who, as in this case, has presided at a four-week trial during which he observed the jury. Cf. *United States* v. *Dioguardi*, 492 F.2d at 81.[4] In these circumstances, where the court had already held a hearing in response to petitioners' first set of allegations, the Sixth Amendment did not require that the court also hold a full-scale evidentiary hearing to supplement the court's own first-hand observation of the jury's behavior.

2. Petitioners also contend (Pet. 11-15) that the court of appeals erroneously rejected their claim that 18 U.S.C. 371, which makes unlawful a conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose," does not apply to the circumstances of this case. This claim, too, lacks merit and requires no further review.

Section 371 applies to a conspiracy to defraud an agency of the United States "in any manner or for any purpose." That language is clearly broad enough to apply to a case such as this one, involving a conspiracy to divert federal funds being lent to a private corporation to further specific federal policies. Under Section 371, "[i]t is not necessary

[4]In two cases relied upon by petitioners (Pet. 9-10), *United States* v. *Taliaferro*, 558 F.2d 724 (4th Cir. 1977), cert. denied, 434 U.S. 1016 (1978), and *Lee* v. *United States*, 454 A.2d 770, 772-773 (D.C. 1982), cert. denied, 464 U.S. 972 (1983), the allegations of juror intoxication pertained only to jury conduct during deliberations. Because jury deliberations occur outside the presence of the trial judge, evidentiary hearings may be more appropriate in that setting. In this case the allegations included jury behavior during the trial—allegations that jurors fell asleep—which the trial judge could evaluate based on his own observations of the jury.

that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated * * *." *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924); see *Dennis* v. *United States*, 384 U.S. 855, 861 (1966) (Section 371 applies to " 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government' " (citation omitted)). Petitioners' fraudulent activities diverted sums that were intended by the two participating federal agencies to promote rural electrification development in an honest and efficient manner.[5] Hence, petitioners were properly prosecuted under 18 U.S.C. 371.

[5]Petitioners do not suggest that the decision of the court of appeals presents a conflict in the circuits, but only that it is inconsistent with the Fifth Circuit decision in *United States* v. *Porter*, 591 F.2d 1048 (1979). Any suggestion of even an intracircuit conflict is meritless, however, because, as petitioners acknowledge (Pet. 14), the Fifth Circuit's subsequent decision in *United States* v. *Burgin*, 621 F.2d 1352, cert. denied, 449 U.S. 1015 (1980), is entirely consistent with the court of appeals' decision in this case. Indeed, the concurring opinion below, upon which petitioners heavily rely (Pet. 11, 12, 14-15), acknowledges that affirmance of petitioners' convictions was compelled by *Burgin*. In all events, the court of appeals in *Porter* reversed the conviction in that case on grounds not present here. In *Porter*, the government claimed that the defendants had violated 18 U.S.C. 371 by defeating the government's right to have the Medicare program operated honestly (591 F.2d 1056). The court of appeals concluded that the Medicare program did not at that time forbid the activities in which the government alleged the doctors had engaged (*ibid.*). In this case, by contrast, REA's contracts with Seminole required that the federal loan monies were to be used, in most cases, only after competitive bidding and, in all cases, only in the most cost-effective manner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
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GLORIA C. PHARES
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OCTOBER 1986

DOJ-1986-10

Supreme Court, U.S.
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CLERK

(3)

No. 86-177

In The
Supreme Court of the United States
October Term, 1986

ANTHONY R. TANNER and
WILLIAM M. CONOVER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 2, 1986
CERTIORARI GRANTED NOVEMBER 3, 1986

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The following opinion and order have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Writ of Certiorari:

DOCKET ENTRIES

DATE	PROCEEDINGS
6/22/83	INDICTMENT. (6 cts.)
6/28/83	ARRAIGNMENT proceedings (Tanner) Deft. waives reading of indictment. Arraigned & plead not guilty. Trial set for weeks of Aug. 8, 15 & 22, 1983; Omnibus hearing on 7/11/83 at 3:00 PM. Bail—$10,000 signature bond.
6/30/83	ARRAIGNMENT proceedings: (Conover) Deft. waives reading of indictment. Arraigned and plead not guilty. Trial set for Aug. 8, 15 & 22, 1983; Omnibus hearing on 7/11/83 at 3:00 PM.
11/ 1/83	PROCEEDINGS: Trial by jury. (Conover & Tanner)
12/12/83	PROCEEDINGS: Jury trial. (BOTH DEFDTS.) Jury deliberating. Mistrial declared—Jury excused.
2/14/84	PROCEEDINGS—Trial by jury. (Conover & Tanner)
3/ 9/84	VERDICT—guilty cts. 1, 2, 4 & 5. NOT GUILTY ct. 3. (Tanner)
3/ 9/84	VERDICT—guilty as to cts 1 thru 5. (Conover)
4/19/84	MOTION AND MEMO for interview of jurors and other relief (TANNER)
4/23/84	ORDER (BK) motion to continue sentencings granted
5/30/84	ORDER (BK) denying motions for leave to interview jurors and for order dismissing the indictment or alternatively, for new trial; clerk to sch sentencings Jun 29, 1984 at 11 am

DATE	PROCEEDINGS
7/ 2/84	NOTICE of appeal filed on 6/29/84 (TANNER)
7/ 2/84	NOTICE of appeal filed on 6/29/84 (CONOVER)
7/ 2/84	JUDGMENT & commitment order. (TANNER) 6/29/84. s/Judge BEN KRENTZMAN.
7/ 2/84	JUDGMENT & commitment order. (CONOVER) 6/29/84. s/Judge BEN KRENTZMAN
10/24/84	Defendant Tanner's Motion to Remand to District Court for Hearing on Motion for a New Trial Based on Jury Misconduct (Court of Appeals for the Eleventh Circuit)
10/30/84	Government's Response to Defendant's Motion to Remand (Court of Appeals for the Eleventh Circuit)
11/13/84	Court of Appeals for the Eleventh Circuit Order on Defendant's Motion for Remand
11/21/84	MOTION for new trial in the District Court based on newly discovered evidence of jury misconduct (TANNER)
12/ 4/84	ORDER (BK) denying deft's motion for new trial
12/ 5/84	NOTICE OF APPEAL of order dated 12/4/84 (CONOVER)
12/ 7/84	NOTICE OF APPEAL or order dated 12/4/84 (TANNER)
6/26/86	Order of the United States Court of Appeals for the Eleventh Circuit on Petition for Rehearing and Suggestion for Rehearing En Banc
9/30/85	Opinion of the United States Court of Appeals for the Eleventh Circuit

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. Case No. 83-70-C-T-8

WILLIAM M. CONOVER and
ANTHONY R. TANNER

The Grand Jury charges that:

COUNT ONE

1. At all times material herein, the Rural Electrification Act (Title 7, United States Code, Section 901, et seq.) was in full effect and it had established a program within the United States Department of Agriculture providing financial assistance to borrowers of funds for the construction of electrical plants and transmission lines in rural areas not receiving central station service by guaranteeing loans issued to borrowers by any legally organized lender.

2. At all times material herein, the Rural Electrification Administration (hereinafter sometimes "REA"), an agency of the United States, was in existence and it administered and enforced the guaranteed loan program.

3. At all times material herein, the Rural Electrification Administration required borrowers participating in its guaranteed loan program to comply with its rules and regulations applicable to the procurement of material, equipment and services to be used in the construction of electrical plants and transmission lines.

4. At all times material herein, Seminole Electric Cooperative, Inc. (hereinafter "Seminole Electric"), was

a Florida corporation owned by several rural electric cooperatives, and it was engaged in the business of furnishing electrical energy to the members of the cooperatives which owned it.

5. At all times material herein, Seminole Electric had applied for and received a $1,104,388,000 loan from the Federal Financing Bank, an agency of the United States Treasury, which loan had been and was guaranteed by the Rural Electrification Administration in accordance with its rules and regulations, for the purpose of constructing an electrical plant and transmission lines in Palatka, Florida.

6. At all times material herein, WILLIAM M. CONOVER was employed by Seminole Electric as its Manager of Procurement, and his duties included the procurement of necessary material, equipment and services, causing competitive bids to be solicited for contracts, reviewing bids received, recommending the awarding of contracts to particular individuals and concerns, assuring performance of contracts and negotiating the prices and terms of changes in contracts.

7. At all times material herein, it was the written policy of Seminole Electric that:

> ". . . employees (were) prohibited from receiving gifts, fees, loans, or favors from suppliers, contractors, consultants, or financial houses, which obligate(d) or induce(d) them to compromise their responsibilities to negotiate, obligate, inspect or audit, purchase or award contracts, with the best interest of (Seminole Electric) uppermost in mind . . ."

8. At all times material herein, ANTHONY R. TANNER was President and part-owner of the following Flori-

da corporations: (a) Citrus Sand and Clay, Inc.; (b) Crystal River Investors, Inc.; and (c) West Central Florida Development Corporation; and in his capacity as President and part-owner ANTHONY R. TANNER exercised supervisory authority over the business affairs of these corporations.

9. Beginning in or about January, 1980, and continuing until in or about January, 1982, at Tampa and Crystal River, in the Middle District of Florida, and elsewhere,

WILLIAM M. CONOVER

and

ANTHONY R. TANNER,

defendants herein, knowingly and willfully did combine, conspire, confederate and agree together and with other persons unknown to the grand jury to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Rural Electrification Administration in its administration and enforcement of its guaranteed loan program.

The Manner and Means of the Conspiracy

10. It was part of the conspiracy that defendant ANTHONY R. TANNER, doing business as Citrus Sand and Clay, Inc., would and did submit bids on and receive two contracts with Seminole Electric for the construction of access roads beneath certain transmission lines (one contract being for road fill material and one being for road construction).

11. It was further a part of the conspiracy that the defendants would and did impede, impair, obstruct and

defeat the competitive bidding process selected by Seminole Electric for use in awarding contracts for the construction of access roads beneath certain transmission lines by causing the following conditions to apply and events to occur during the bidding process which would be and were to the advantage of defendant ANTHONY R. TANNER and to the disadvantage of his competitors:

(a) the specifications in the contract for the road fill material were drawn so as to make material owned by defendant ANTHONY R. TANNER suitable and to make material owned by his competitors unsuitable;

(b) the time period allowed to interested parties in which to submit a bid on the road construction contracts was so short as to preclude defendant ANTHONY R. TANNER's competitors from submitting effective bids; and

(c) defendant WILLIAM M. CONOVER made and caused to be made false, fictitious and fraudulent statements to other employees of Seminole Electric in an effort to pursuade Seminole Electric to award the contracts to defendant ANTHONY R. TANNER.

12. It was further a part of the conspiracy that defendant ANTHONY R. TANNER, through his corporations Crystal River Investors and West Central Florida Development Corporation, would and did corruptly give, offer and promise things of value, namely, money and property, to defendant WILLIAM M. CONOVER, because of acts performed and to be performed by defendant WILLIAM M. CONOVER in his capacity as Manager of Procurement at Seminole Electric in regard to the contracts

for the construction of access roads beneath certain transmission lines.

13. It was further a part of the conspiracy that defendant WILLIAM M. CONOVER would and did, directly and indirectly, unlawfully and without authorization, ask, demand, exact, solicit, seek, accept, receive and agree to receive from defendant ANTHONY R. TANNER and his above-mentioned corporations things of value for himself, namely, money and property, because of acts performed and to be performed by him in his capacity as Manager of Procurement at Seminole Electric in regard to the contracts for the construction of access roads beneath certain transmission lines.

14. It was further a part of the conspiracy that the defendants would and did cause Seminole Electric to falsely state and represent to the Rural Electrification Administration that an REA-approved competitive bidding procedure had been followed in awarding the access road construction contracts.

15. It was further a part of the conspiracy that the defendants would and did misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden, the purposes of and acts done in furtherance of the conspiracy.

16. In furtherance of and to effect the objects of the conspiracy, and to accomplish its purposes and objectives, the defendants did and committed the following

OVERT ACTS

(a) On or about April 18, 1980, defendants WILLIAM M. CONOVER and ANTHONY R. TANNER

travelled together from Crystal River, Florida, to the Bahamas.

(b) On or about July 26, 1980, at Crystal River, Florida, defendant WILLIAM M. CONOVER and defendant ANTHONY R. TANNER, doing business as Crystal River Investors, entered into a contract in which defendant WILLIAM M. CONOVER agreed to purchase a condominium from Crystal River Investors in Crystal River, Florida.

(c) On or about January 20, 1981, at Crystal River, Florida, defendant ANTHONY R. TANNER, doing business as West Central Florida Development Corporation, caused defendant WILLIAM M. CONOVER, doing business as C & C Associates, to enter into a contract with another individual in which defendant WILLIAM M. CONOVER agreed to perform certain landscaping work at a condominium complex owned by defendant ANTHONY R. TANNER through Crystal River Investors in exchange for a fee.

(d) In or about March, 1981, defendant WILLIAM M. CONOVER had a conversation with defendant ANTHONY R. TANNER and a representative of Florida State Engineers, Inc.

(e) On or about March 9, 1981, at Crystal River, Florida, defendant ANTHONY R. TANNER caused a check of the following tenor and description to be written and given to defendant WILLIAM M. CONOVER:

> Check Number 162, drawn on the account of Anthony Tanner and Marglen Tanner at the First Federal Savings and Loan Association of Brooksville, Brooksville, Florida, dated March 9, 1981, payable to C & C Associates, in the amount of $10,035.

(f) On or about March 25, 1981, defendant WILLIAM M. CONOVER had a telephone conversation with another employee of Seminole Electric.

(g) On or about March 26, 1981, defendant ANTHONY R. TANNER had a conversation with an employee of Seminole Electric in Citra, Florida.

(h) On or about April 2, 1981, at Tampa, Florida, defendant WILLIAM M. CONOVER caused a purchase order for road fill material valued at $199,500 to be issued to defendant ANTHONY R. TANNER, doing business as Citrus Sand & Clay.

(i) On or about April 8, 1981, at Tampa, Florida, defendant WILLIAM M. CONOVER wrote and submitted a memorandum to another employee of Seminole Electric concerning the road fill material contract.

(j) On or about April 15, 1981, defendants WILLIAM M. CONOVER and ANTHONY R. TANNER travelled together from Crystal River, Florida, to the Bahamas.

(k) On or about April 29, 1981, at Tampa, Florida, defendant WILLIAM M. CONOVER issued a bid solicitation in regard to the two road construction contracts.

(l) On or about May 7, 1981, at Tampa, Florida, defendant ANTHONY R. TANNER, doing business as Citrus Sand and Clay, submitted bids to Seminole Electric on the road construction contracts.

(m) On or about May 7, 1981, defendant WILLIAM M. CONOVER had a conversation with another employee of Seminole Electric in Tampa, Florida.

(n) On or about May 10, 1981, at Crystal River, Florida, defendants WILLIAM M. CONOVER, doing business as C & C Associates, and ANTHONY R. TANNER, doing business as West Central Florida Development Corporation, entered into a contract in which defendant WILLIAM M. CONOVER agreed to manage a condominium complex for defendant ANTHONY R. TANNER in exchange for a fee.

(o) On or about May 13, 1981, at Crystal River, Florida, defendant ANTHONY R. TANNER caused a check of the following tenor and description to be written and given to defendant WILLIAM M. CONOVER:

> Check Number 257, drawn on the account of Anthony Tanner and Marglen Tanner at the First Federal Savings and Loan Association of Brooksville, Brooksville, Florida, dated May 13, 1981, payable to C & C Associates, in the amount of $6,000.

(p) On or about May 14, 1981, at Tampa, Florida, defendant WILLIAM M. CONOVER caused defendant ANTHONY R. TANNER, doing business as Citrus Sand and Clay, to be awarded the road fill material contract in an amount of approximately $1,041,817, and the road construction contract in an amount of approximately $548,000.

(q) On or about May 14, 1981, at Crystal River, Florida, defendant WILLIAM M. CONOVER obtained title to a condominium from defendant ANTHONY R. TANNER, doing business as Crystal River Investors.

(r) In or about June, 1981, defendant ANTHONY R. TANNER had a conversation with an individual in Crystal River, Florida.

(s) In or about June, 1981, defendant WILLIAM M. CONOVER had a conversation with several individuals in Crystal River, Florida.

(t) In or about July, 1981, defendant WILLIAM M. CONOVER had a conversation with another employee of Seminole Electric in Tampa, Florida.

(u) On or about July 9, 1981, at Tampa, Florida, defendant WILLIAM M. CONOVER wrote and submitted a memorandum to another employee of Seminole Electric concerning a change in the road fill material contract.

(v) On or about July 18, 1981, at Crystal River, Florida, defendant ANTHONY R. TANNER caused a check of the following tenor and description to be written and given to defendant WILLIAM M. CONOVER:

> Check Number 473, drawn on the account of West Centrai Florida Development Corporation at the First Marion Bank, Ocala, Florida, dated July 18, 1981, payable to C & C Associates, in an amount of $2,000.

(w) On or about July 27, 1981, at Tampa, Florida, defendant WILLIAM M. CONOVER wrote and submitted a memorandum to another employee of Seminole Electric concerning .he specifications for the road fill material contract.

(x) On or about September 4, 1981, at Crystal River, Florida, defendant ANTHONY R. TANNER caused a check of the following tenor and description to be written and given to defendant WILLIAM M. CONOVER:

> Check Number 594, drawn on the account of West Central Florida Development Corporation at the First Marion Bank, Ocala, Florida, dated September 4, 1981, payable to C & C Associates in an amount of $2,965.

(y) On or about November 9, 1981, defendant WILLIAM M. CONOVER had a conversation with a Special Agent of the Federal Bureau of Investigation in Tampa, Florida.

(z) The Grand Jury realleges and incorporates by reference the allegations of Counts Two through Six as overt acts as though fully set forth herein.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

1. Beginning in or about January, 1980, and continuing to in or about January, 1982, at Tampa and Crystal River, in the Middle District of Florida and elsewhere,

WILLIAM M. CONOVER

and

ANTHONY R. TANNER,

defendants herein, knowingly devised and intended to devise a scheme and artifice to defraud:

(a) the United States by impeding, impairing, obstructing and defeating the lawful function of the Rural Electrification Administration in its administration and enforcement of its guaranteed loan program; and

(b) Seminole Electric Cooperative, Inc., of its right to have its process and procedures for the procurement of materials, equipment and services run honestly and free from deceit, corruption and fraud, and of its right to the honest and faithful services of its employees.

2. The substance of the scheme and artifice and its manner and means are described in paragraphs 1 through 8

and 10 through 16 of Count One of this Indictment, and the Grand Jury realleges and incorporates by reference those paragraphs as though fully set forth herein.

3. On or about April 22, 1981,

WILLIAM M. CONOVER

and

ANTHONY R. TANNER,

defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, knowingly caused to be delivered by mail in the Middle District of Florida, according to the directions thereon, an envelope containing a letter, which envelope and letter were addressed to:

Seminole Electric Cooperative, Inc.
2410 East Busch Boulevard
Tampa, Florida 33612

Attention: Mr. Bill Conover

In violation of Title 18, United States Code, Section 1341.

COUNT THREE

1. The Grand Jury realleges and incorporates by reference paragraphs one and two of Count Two of this Indictment as though fully set forth herein.

2. On or about May 4, 1981,

WILLIAM M. CONOVER

and

ANTHONY R. TANNER,

defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do

so, knowingly caused to be delivered by mail in the Middle District of Florida, according to the directions thereon, an envelope containing a letter, which envelope and letter were addressed to:

Mr. William M. Conover
Procurement Manager
Seminole Electric Cooperative, Inc.
Post Office Box 17100
Tampa, Florida 33682

In violation of Title 18, United States Code, Section 1341.

COUNT FOUR

1. The Grand Jury realleges and incorporates by reference paragraphs one and two of Count Two of this Indictment as though fully set forth herein.

2. On or about May 11, 1981,

WILLIAM M. CONOVER

and

ANTHONY R. TANNER,

defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, knowingly caused to be delivered by mail in the Middle District of Florida, according to the directions thereon, an envelope containing a letter, which envelope and letter were addressed to:

Mr. William M. Conover
Procurement Manager
Seminole Electric Cooperative, Inc.
Post Office Box 17100
Tampa, Florida 33682

In violation of Title 18, United States Code, Section 1341.

COUNT FIVE

1. The Grand Jury realleges and incorporates by reference paragraphs one and two of Count Two of this Indictment as though fully set forth herein.

2. On or about May 14, 1981, at Tampa, Florida, in the Middle District of Florida,

WILLIAM M. CONOVER

and

ANTHONY R. TANNER,

defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, knowingly did place and cause to be placed in an authorized depository for mail matter to be delivered by the United States Postal Service, an envelope containing a mailgram addressed to:

Citrus Sand and Clay
Attn Kim Murphy
P. O. Box 2093
Crystal River, FL 32661

In violation of Title 18, United States Code, Section 1341.

COUNT SIX

On or about June 3, 1981, at Tampa, Florida, in the Middle District of Florida,

WILLIAM M. CONOVER

and

ANTHONY R. TANNER,

defendants herein, did willfully and knowingly make and cause to be made false, fictitious and fraudulent statements concerning material facts in a matter within the jurisdiction of the Rural Electrification Administration, an agency of the United States, in a "Certification and Recommendation of Negotiating Committee" submitted by Seminole Electric Cooperative, Inc., to the Rural Electrification Administration in Washington, D.C., in connection with the fill material contract, in which defendants stated and represented and caused to be stated and represented the following:

(1) the "informal bidding procedure" had been followed;

(2) bidding had been done on REA approved plans, specifications and evaluations; and

(3) each qualified bidder had had an equal opportunity to negotiate;

whereas in truth and fact as the defendants then knew:

(1) the "informal bidding procedure" had not been followed;

(2) bidding had not been done on REA approved plans, specifications and evaluations; and

(3) each qualified bidder had not had an equal opportunity to negotiate;

In violation of Title 18, United States Code, Sections 1001 and 2.

A TRUE BILL,

.....

FOREMAN

ROBERT W. MERKLE
United States Attorney

By: /s/ Terry A. Zitek
Assistant United States Attorney

By: /s/ George E. Tragos
Chief, Criminal Division

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No.
83-70-Cr-T-08

WILLIAM M. CONOVER and
ANTHONY R. TANNER,

Tampa, Florida
February 24, 1984
9:30 o'clock a.m.

Defendants.

VOLUME EIGHT
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE BEN KRENTZMAN
AND A JURY

[Appearances omitted in printing]

(p. 8-96) MR. ZITEK: Thank you, your Honor. Our next witness is Mr. Alexander Sherman.

THE CLERK: Come forward and be sworn.

Are you the witness Mr. Sherman?

MR. SHERMAN: Yes, I am.

THE CLERK: Raise your right hand.

ALEXANDER E. SHERMAN, GOVERNMENT'S WITNESS, SWORN

THE CLERK: Please be seated in the witness box.

Please state your name for the record and spell your last name.

THE WITNESS: Alexander E. Sherman, S-h-e-r-m-a-n.

DIRECT EXAMINATION

BY MR. ZITEK:

Q Could you tell us by whom you are employed?

A Employed with the Rural Electrification Administration.

Q Where is your office located?

A Washington, D.C.

Q What is your present title?

A Chief of the distribution and transmission engineering branch.

Q Between 1980 and 1981, what was you position with REA?

A I was the Chief of the power transmission branch.

Q As Chief of the power transmission branch, would you tell(p. 8-97) us what your duties were back then?

A Yes, I coordinated the activities—the borrower's activities related to transmission construction, and that's nationwide.

Q How long have you worked for REA?

A For 19 years.

Q And have you received a college education?

A Yes, B.S. Degree in Engineering from Lowell Technological Institute.

Q Mr. Sherman, is the Rural Electrification Administration part of another branch of the Government?

A It's part of the United States Department of Agriculture.

Q Are you familiar with a program that REA participates in known as the Guaranteed Loan Program?

A Yes.

Q And, could you tell us briefly what that program is?

A The program was established by Congress back about ten years ago to supplement the existing loan program, and essentially Congress authorizezd REA to guarantee loans from other lending institutions.

Q And, could you tell us how that program works?

A Essentially REA reached an agreement with the Federal Financing Bank at the same time where the Federal Financing Bank would raise money and be a resource for those funds as an outside lending institution. Other lending institutions (p. 8-98) could also participate in the program, but the Federal Finance's Bank interest rate is so much more lower that 99 percent of the loans made were made through the Federal Financing Bank. The guaranteed program is available to all REA borrowers who apply for loans.

Q And, how do they go about applying for loans?

A They—first, of course, they have to qualify as an REA borrower, and that's—one qualification is to serve rural areas under the Act. And, the second thing would be to come forth with a project, that is, a power supply project that is feasible, economical and effective to supply

rural areas; they would then apply for a loan, they would send in a loan application.

Q If the loan application is approved, what happens after that?

A Once the loan application is approved, the loan documents, loan contracts, mortgage notes are sent back to the borrower for execution. Also a commitment—I guess they made a commitment to F.F.B. for the money. And then after that, then the borrower will deal strictly with REA as an agent for the Federal Financing Bank.

Q Mr. Sherman, are you familiar with a company known as Seminole Electric Cooperative?

A Yes.

Q Do you know if Seminole Electric Cooperative has or is (p. 8-99) participating in the Guaranteed Loan Program with REA?

A Yes.

Q I've placed in front of you two Exhibits, 1-A and 1-H. Do those appear to be the loan contract and the mortgage that was entered into between Seminole and REA?

A Yes, they appear to be.

Q Now, with regard to a company known as Seminole Electric, have you, in your capacity as an employee of the REA, had occasion to deal with the Seminole Electric Company itself?

A Yes.

Q Could you tell us what the nature of your relationship has been with Seminole Electric?

A Seminole Electric—my involvement has been with the transmission lines coming out of the power plant and the planning, design, construction of those lines.

Q Did your responsibility include any patrol roads beneath the transmission line as well as the transmission lines themselves?

A Yes.

Q In dealing with Seminole Electric, were there any individuals at Seminole Electric that you dealt with more than others?

A Yes.

Q And, who are the people you dealt with?

A Bob Claussen, Bob Ross, Bill Conover, Roger Pile and there were several others underneath.

(p. 8-100) Q Did you know what position Bill Conover held with Seminole Electric?

A He was their, I guess, Chief Procurement Officer.

Q When you dealt with these people, was this in person or over the phone?

A Over the phone, mostly.

Q Now, with regard to the relationship between REA and Seminole Electric after one of these loan contracts are entered into, does the REA have any kind of publications that it issues to its borrowers telling them or interpreting their rights and responsibilities under these loan documents that you have in front of you?

A Yes.

Q What are those publications called?

A Bulletins.

Q Is there one that deals particularly with the building of transmission line facilities?

A Yes.

Q What's the number of that one?

A 40-6.

Q In your dealings with Seminole Electric as well as the other borrowers, do you from time to time, talk to them about the provisions of REA Bulletin 40-6?

A Yes.

Q Now, under the provisions of the loan contract, mortgage (p. 8-101) and these bulletins, are some contracts that the borrower wants to enter into subject to some kind of prior approval before they can be awarded to a contractor?

A Yes.

Q And could you tell us how that approval procedure works with regard to REA?

A All right. REA has—there are several contracts that are subject to REA approval and several that are not. Under the normal—normal situation, the borrower would prepare plans and specifications, whether it be transmission line or clearing, and send those into REA and get those approved prior to releasing them to bidders, and then they would go ahead and release to bidders, the bids would be received, they would then award the contract to the low responsible bidder and send those con-

tracts to REA for approval if they're subject to REA approval.

Q In this particular case, are you familiar with a spreading contract that was awarded to a company known as Citrus Sand and Clay?

A Yes.

Q And could you tell us how you are familiar with that contract?

A That contract—the contract was actually preceded by another contract for the clearing of the transmission line. In this other contract, the road building appeared to be a lot (p. 8-102) larger than was anticipated, it was going to require a lot more fill dirt and spreading, so they entered into a separate contract to—to purchase fill and another contract to spread this fill over the—for building roads underneath the transmission lines. And, the borrowers contacted us and discussing what contract for him to use and possibly what bidding procedure.

Q To the best of your knowledge, were both the fill contract and the spreading contract that had followed the award to Journagan contracts that were part of the loan guarantee funds?

A Yes.

Q Now, are there also some contracts to be awarded by a borrower which don't require specific prior REA approval before they are put out on the street or awarded to contractors?

A Yes.

Q Have you, with regard to Seminole Electric, from time to time, gotten involved in negotiations with Seminole Electric over contracts that did not specifically require REA approval?

A Discussions with them, yes.

Q Can you give us an example of that, of a contract where that occurred?

A In the—prior to construction of the line, there were several contracts issued on materials to go into the line. One of the such contracts was for steel poles to go in a certain section of the line that required aesthetic structures. (p. 8-103) These steel poles were awarded to a company under a negotiated bid procedure, the contracts were then submitted to REA for review and for file. And, I don't know is this specific contract required REA approval or not. There were two different contract forms they used for materials.

However, there was a problem with—that we saw with one of the exceptions that one of the bidders—the low bidder took on the contract, and we questioned the exception taken and I don't think it's been resolved today.

Q Mr. Sherman, when you say you questioned it, did you contact somebody at Seminole?

A Yes, I think we contacted Bill Conover.

Q Now, in addition to the Journagan contract and the spreading contract, did you also have some kind of review authority over the contract that was known by Seminole as the Hunter Road North construction contract?

A Yes.

Q With regard to the fill material contract, did you —did you ever receive a copy of that contract?

A Yes.

Q Before that contract was awarded, do you recall having a conversation with anybody at Seminole Electric about what to do about bidding that contract?

A Yes. I had conversations sometime in March, I guess, of '81. I believe, where they—they had contacted me regarding (p. 8-104) the fact that they were going to have to go out and get a separate contract for fill material.

Q And, when you say "They," who are you talking about?

A Excuse me, I think it was Bob Claussen and Bob Ross, I believe.

Q Okay. Could you tell us what the conversation was between yourself, Mr. Claussen and Mr. Ross?

A They—

MR. MILBRATH: Excuse me, your Honor, this is obviously hearsay.

MR. ZITEK: Judge, we're not offering this for the truth but simply to show what took place, what conversations took place.

MR. MILBRATH: Obviously, then, the content shouldn't be made public. I think that the people that had the conversation should talk about what they said.

MR. ZITEK: Well, he is one of the people that had the conversation, Judge.

THE COURT: I'm going to overrule the objection, and it will be received not for the truth of the content but for the fact that a conversation of this type did occur. It's a procedural matter. I'll overrule your objection.

BY MR. ZITEK:

Q Tell us what the conversation was, Mr. Sherman.

A The conversation entailed Seminole looking for, one, what (p. 8-105) contract form to use for the fill; and, two, bidding procedure to use in obtaining the fill. And, I made some recommendations and they followed them.

Q What were your recommendations?

A Recommendations were that they use a materials contract form, which was Form 173, and that they use informal competitive bidding procedure.

Q Does—informal bidding procedure, is that a special term that REA uses?

A That is a separate bidding procedure. REA has three distinct bidding procedures.

Q What are they?

A One is formal bidding procedure, it has a public bid opening; the second procedure is an informal bidding procedure which does not have a public bid opening but the end result is that the low bid has to be fully compliant with the specs, but there is some room in there to negotiate in terms of the bidding; and the third bidding procedure is the negotiated bidding procedure.

Q With regard to the fill contract, what procedure did Seminole indicate to you that they were going to use?

A The informal bidding procedure.

Q When they indicated that they were going to use that, did you tell Mr. Ross or Mr. Claussen what steps

they were to follow if they elected to use the informal competitive bidding (p. 8-106) procedure?

A No, they were familiar with the informal competitive bidding procedure. Seminole used it many times in its power plant construction.

Q Now, Mr. Sherman, with regard to the procedure whereby a company goes about getting a release of funds, can you tell us how that works, if you know?

A REA has a budget procedure where in order to get advance—I think is what you mean—advance of loan funds from REA, they need to submit some document or something, contract, purchase orders, requests for those funds to be approved for advance. And, once the document comes in and found acceptable, the money is approved for advance and the borrower submits a series of requisitions to obtain those funds.

Q Is that the procedure that Seminole was following in this case, the procedure you described?

A Yes.

MR. ZITEK: I have no further questions, Judge.

THE COURT: You may examine.

MR. LAZZARA: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. LAZZARA:

Q Good afternoon, Mr. Sherman.

A Good afternoon.

Q You mentioned that some contracts are subject to REA (p. 8-107) approval and some are not, is that correct?

A That's correct.

Q I have a document here for you. I'll just give this to you here, I may be asking you some questions about it.

(Document handed to the witness.)

Now, you mentioned—you testified that apparently both contracts, meaning the spreading contract and the fill material contract, that Citrus had with Seminole were part of the Loan Guarantee Fund, is that correct?

A That's correct.

Q How did you determine that? How did you make that determination?

A Well, I determined it on the basis that REA had made a loan to Seminole for power plant and transmission lines, and the activities relating to the construction of transmission lines, if it's access roads or whatever, are normally funded by REA.

Q Okay. Well, did you research any documents with regard to these particular contracts?

A No.

Q Was the REA—did the REA have any documents showing that these two contracts you just testified about were, in fact, part of the Loan Guaranteed Funds?

A No.

Q So, was it your opinion that—

(p. 8-108) A Except the loan—you know, the loan contract, we loaned the money for the transmission lines and normally we provide for whatever it takes to build the transmission line. The loans do not get—a lot of times get that detailed into real small pieces of the project.

Q All right. You mentioned the Journagan contract. First you have the Journagan contract and then the Citrus contract, correct?

A Correct.

Q You testified that the road building with regard to the Journagan contract was a lot larger than it was anticipated to be?

A The road building part of it, correct.

Q And, were you in contact with Seminole during that period of time about the problems associated with the performance of the Journagan contract?

A Yes.

Q All right. Was that on a daily basis?

A No.

Q And who would you be in contact with?

A Bob Ross or Bob Claussen.

Q They're with the Engineering Department?

A That's correct.

Q And as a result of that, to your knowledge, was the plant schedule behind schedule?

(p. 8-109) A No. As far as we knew at that time, the plant was still on schedule. The transmission line was butting up against the schedule.

Q Okay. To your knowledge, if the transmission line fell behind schedule, would that affect the plant schedule?

A Yes, probably.

Q And in your capacity at that time with the REA, did you feel that it was in the best interest of the REA with regard to the loan guarantee that all impediments in getting that plant on schedule be removed, if possible?

A That is correct.

Q Now, you mentioned that in March of 1981 you had a conversation with both Mr. Claussen and Mr. Ross, is that correct?

A Yes.

Q All right. Did you document that conservation in any way whatsoever?

A I may have. I may have. There were several letters written in the file on the problems with the road.

Q Okay. Do you recall when that conversation took place?

A In March, as I understand, best I can recollect.

Q Do you recall whether it was the latter part or the mid-part or do you know?

A No.

Q And what they were concerned about was the fill material contract, is that correct?

(p. 8-110) A They were concerned about the fill material contract and what was best to keep the project moving.

Q Okay. And you mentioned you made some recommendations to them?

A Yes.

Q Were your recommendations binding on them?

A As far as the materials contract, it could have used a purchase order and we could have forced the issue. As far as the bidding procedure, that was pretty well their request to use a bidding procedure, and I suggested one. We worked it out together and it was as binding as could be, I guess, that they followed.

Q Could they have, under REA bidding procedures and under 40-6, have gone out and negotiated with people just to get fill if they wanted to without bidding it out?

A Yes. Informal quotes—they could have used informal quotes.

Q So, under the REA 40-6, they didn't necessarily have to bid it out?

A No, they had that choice. They had a choice of formal bidding or informal quotes, they took a compromise.

Q With regard to the fill material contract itself, I believe you said it was 173?

A Right, REA Form 173, Materials Contract.

Q And you have before you Exhibit 3-N, I believe, which is (p. 8-111) the Fill Material Contract with Citrus, sir?

A Yes.

Q And, is that on a form—Form 173?

A Yes, it is.

Q Okay. And, did that specific contract require REA approval?

A This specific contract does not require REA approval.

Q And, to your—who is Mr. Frank Bennett, sir?

A Frank Bennett is presently Director of the North Central area in Washington.

Q What was his position back during this period of time that we're talking about?

A He was Director of Power Supply Division, under which I worked.

Q All right. Was he superior to you, sir?

A Yes.

Q Do you recall whether or not Mr. Bennett ever gave a written opinion to Seminole to the effect that that contract, 3-N, did not require REA approval?

MR. ZITEK: Judge, I object, it's beyond the scope of Direct and I think it's irrelevant.

THE COURT: I'll sustain the objection. And disregard the question, please.

BY MR. LAZZARA:

Q With regard to the spreading contract, did that require (p. 8-112) REA approval?

A That contract was executed on a Form 203 and that required REA approval.

Q All right. Under REA procedures, was it required that the proposed contract that was to be sent out for bid be first submitted to you?

A For our review, right.

Q To your knowledge, was a copy of that contract sent to you for your review before it was let out for bids?

A I don't know. That's all I can say, I don't know. I have no record of—normally if plans and specifications are submitted to REA for review prior to issuance, then REA would officially approve it in writing, and I have no records that I can recall.

Q I'm going to hand you what's been marked as Mr. Conover Exhibit No. 33, sir, and ask you to look at that particular document.

(Document handed to the witness.)

A Yes.

Q Do you recognize that particular document, sir?

A Well, it's a letter from William Conover to me, but whether I recognize it or not, I don't know.

Q All right. Under what date is it, sir?

A April 14, 1981.

Q To your knowledge, does it relate to the right-of-way (p. 8-113) road construction contract that was to be let by Seminole?

A The date would place it to be that contract.

Q Okay. And, to your knowledge, was it the normal practice of the REA to receive letters of this type from Seminole requesting REA's review and approval of such contracts?

A Yes.

Q And, to your knowledge, was this letter received by you as an official of the REA in the normal course of REA's business dealings with Seminole?

A I don't know if I received it.

Q Is it addressed to you?

A Yes, it is.

Q If such a letter was addressed to you, would you have normally received it and reviewed it—

A Yes.

Q —and acted upon it?

A I normally would have.

MR. LAZZARA: Your Honor, at this time I move into evidence Mr. Conover's Exhibit No. 33.

MR. ZITEK: Judge, I have to object.

THE COURT: Do you want to be heard?

MR. LAZZARA: Yes, sir.

(Proceedings had at sidebar.)

THE COURT: Didn't this, in fact come from the REA records?

(p. 8-114) MR. LAZZARA: Came from Seminole's records, but it's a letter addressed from Mr. Sherman to Mr. Conover.

THE COURT: He didn't know whether he normally would have gotten it if it had been mailed. You know, if anything, why don't you have Seminole put it in if it came from their records?

MR. LAZZARA: Judge, at this time—maybe I should have approached the bench before—there are certain documents I would like to get in through this man, and, of course, it would be outside the scope of Direct Examination. I've shown them to Mr. Zitek, he said, "Well, you can try." I don't want to waste the time of the Court or the jury.

THE COURT: Well, if it will save his time from coming back, you can take him on Direct. You may have forgotten how to do that.

MR. LAZZARA: Judge, I thought I did a pretty good job this time in trying to get it in.

THE COURT: Yes, I guess it was. Well, I'm not criticizing you for cross-examining, but I'm saying it's been a long time since I've heard you ask anybody a question on Direct, and you get in bad habits, spending two weeks cross-examining.

MR. ZITEK: Judge, I don't have any objection if Mr. Lazzara wants to produce records of this witness. He's got to be able to identify them.

(p. 8-115) THE COURT: Well, I'm going to sustain the objection. He can't qualify it as anybody's record. But, if you've got somebody who can, I'll let you take him on Direct and see if you can get it in.

MR. LAZZARA: I wanted to seek to introduce through this man the letter that Mr. Bennett sent to Mr. Wright with regard to the area of approval—REA's position with regard to approval.

THE COURT: Do you know if he knows anything about it?

MR. LAZZARA: We discussed it with him at the last trial.

MR. BEST: If that letter came from the REA files, we sure—

THE COURT: It was a copy of a letter?

MR. BEST: Yes, it was pursuant to a subpoena to Mr. Bennett at the last trial.

MR. ZITEK: Judge, that letter was Mr. Bennett's opinion. I think Mr. Bennett's opinion is irrelevant and it's cumulative.

THE COURT: Is Mr. Bennett here?

MR. BEST: Mr. Bennett hasn't been subpoenaed yet.

THE COURT: This time?

MR. BEST: He was here last time but not this time.

MR. LAZZARA: Judge, I'll just—

(p. 8-116) MR. BEST: They came from his file.

THE COURT: Well, that would be hearsay objection but not necessarily an objection on the grounds of expression of opinion.

MR. BEST: Yes, sir, I understand.

THE COURT: So, what do you want to do?

MR. LAZZARA: Judge, I'll try to authenticate some documents. Can I take him as if he were on Direct at this time?

THE COURT: Yes. But, don't disclose the content of the Exhibit because if it's not held to be admissible, it's not admissible.

MR. LAZZARA: I understand.

THE COURT: All right. I'll sustain the objection to this question—I mean, to this Exhibit, this is—

MR. LAZZARA: Exhibit 33.

THE COURT: The Government's Exhibit 33—no, Conover's 33. I'll sustain this one.

(End of discussion at sidebar.)

THE COURT: Now, I have sustained the objection to that proposed—Conover's Exhibit 33. It has not been established as a business record and it's not otherwise admissible.

All right, sir.

MR. LAZZARA: Thank you, sir.

* * *

CROSS-EXAMINATION

(p. 8-123) BY MR. MILBRATH:

Q Good afternoon, Mr. Sherman.

A Good afternoon.

Q Mr. Sherman, which agency of the Government was actually the agency that agreed to provide the money for the construction (p. 8-124) of that power plant?

A Federal Financing Bank.

Q And was the REA serving, more or less, in the nature of a loan agent?

A They were, as far as the advancement of loan funds. I believe, though, that they still—all of the requirements of REA would have to meet.

* * *

(p. 8-125) Q Now, you had a conversation at one time with respect to the problem of getting adequate fill in that transmission line road, is that true?

A Right.

Q And did that take place in March or April of 1981?

A That's my best recollection.

Q At that time, did you have a discussion with either Ross or Mr. Claussen?

A Yes.

Q Bob Ross or Bob Claussen?

A Yes.

(p. 8-126) Q And, at that time, were you told that Seminole Electric was looking for advice to you as to how to go about acquiring a contract for material?

A Yes.

Q And, you discussed with them whether or not they could buy the material by informal quotes from suppliers in the area, did you not?

A Want to repeat the question, please?

Q Did you tell Mr. Claussen or Mr. Ross, which ever one it was that you spoke to, that Seminole Electric could

either buy the material by informal quotes from suppliers or it could let it out for bids?

A Yes, I advised him those were the two options and recommended the bidding, which they recommended, too.

Q And they decided to do just that, to bid it?

A To bid it.

Q And you asked to see the executed contract when it was signed?

A Yes.

THE COURT: Counsel, are you cross-examing? So far you're just confirming his testimony. The jury heard that and we don't want to spend any more time than is required to try this case. We want to spend enough time but no more. Please move on.

MR. MILBRATH: Yes, sir.

(p. 8-127) BY MR. MILBRATH:

Q Did you evaluate the contract when it came in, sir?

A We reviewed the evaluation.

Q Now, there was a time, was there not, when you were involved in the decision as to whether the spreading contract as opposed to the fill dirt contract would have to be approved by the REA, is that true?

A No, there was no—it was decided that it would have to be approved and that was it, there was no discussion.

Q Now, do you recall there being some question in the REA as to whether that contract did have to be approved?

MR. ZITEK: Judge, I object, it's beyond the scope of Direct.

MR. MILBRATH: Your Honor, I think he testified about the approval of the contract.

THE COURT: Yes, sir, that's it. And, he just said again that they didn't make that requirement, and that's it. I'll sustain the objection.

BY MR. MILBRATH:

Q Was there a disagreement with—

THE COURT: I'll sustain the objection to that question and don't ask it again.

BY MR. MILBRATH:

Q Who was your boss at that time?

A Mr. Frank Bennett.

(p. 8-128) Q Now, you testified that the contract would have to be on a Form 203, is that correct, the spreading contract?

A That is correct.

Q Whose decision was that, that it had to be on a Form 203?

A Both Seminole's and mine.

Q Did you tell Seminole or did they ask you what form it had to be on?

A 203 Form was used for the Journagan contract, and, therefore, it was natural to use the 203 Form for this contract.

Q Is there a REA Form, sir, for spreading of fill dirt?

A Not a form entitled spreading of fill dirt, no, sir.

Q The Form 203 is essentially a right-of-way clearing contract, is it not?

A That is correct.

Q Now, on what do you base your decision that the right—that the spreading contract was subject to REA approval in the first place?

A Transmission construction for power supply borrowers requires REA approval.

Q I'm sorry.

A Contracts for transmission construction for power supply borrowers require REA approval.

Q And where does it say that?

A Section 40-6.

Q So, you're relying on a particular provision, 40-6?

(p. 8-129) A Yes, and my experience.

Q Do you have that with you, sir, 40-6 that you rely on?

A I have a copy here.

Q Could you find for us that provision that you're relying upon that says the spreading contract was subject to approval?

A Do you want me to dig out my copy?

Q If you don't mind. If you have it there available. Let me just show you mine, I think this is—

A They should be the same.

(Document handed to the witness.)

Would you like me to go on now?

Q Could you find the—

THE COURT: I'd like for you to answer the question, if you can. The question is, can you find—upon what in there do you rely upon for your decisions? That's what he wanted to know.

THE WITNESS: There's a section in there entitled "REA Approval of Borrower's Construction." Section C, "Requirements concerning REA approval of plans and specifications in contracts for the purchase of materials and equipment and for construction are summarized in the enclosed exhibit form."

BY MR. MILBRATH:

Q And, the exhibit is attached to that, is it not?

A The exhibit is attached to it.

Q All right. Would you turn to that exhibit showing where (p. 8-130) it says that that kind of contract would be subject to REA approval?

A Under "Transmission," Transmission Form 831 requires REA approval.

Q What is a Form 831?

A That is the transmission construction.

Q That's not the form that you used on this contract, though, was it?

A No, transmission is not defined.

Q Okay. So, you're basing that on your experience only?

A Correct.

Q Is it true that there's no documents that you know of in existence at the REA that gives the definition of transmission lines and includes within that definition dirt roads under them?

A No.

Q Is that true or not?

A That's true.

Q So would it also be true that essentially—in your opinion, that the spreading contract was covered by REA approval was based upon your experience in dealing with the REA?

A Construction of transmission lines, that's correct.

Q And not upon any regulations that explicitly say that?

A The regulations refer to transmission lines and transmission facilities, and these would be included as covered, in my opinion and in my experience.

(p. 8-132) Q Now, I'll show you Tanner's Exhibits 3 and 4 for identification.

(Documents handed to the witness.)

Don't tell us what the contents are yet, just tell us whether or not you recognize seeing those before?

A Yes.

A No, Form 203.

Q Is there anything on Exhibit 1 or Exhibit I, which ever it is, that says anything about Form 203?

A Form 203 was not available at the time this 40-6 was prepared and was not added to it—it does not show up there.

Q So, it doesn't say that Form 203's are subject to REA's approval, does it?

A Form 203 says that.

Q Where does Form 203 say that?

A At the end of the contract form, it's subject to REA approval, there's a clause in the contract.

Q Well, where in your REA 40-6 does it say that that kind of contract falls within a Form 203 that has to be subject to approval?

A Under "Transmission Construction."

THE COURT: He answered the question.

BY MR. MILBRATH:

(p. 8-131) Q And the provision you're relying upon is the one you just quoted, Roman Numeral IIIC-5?

A That's correct.

Q Now, is there anything in the definition of "Transmission Construction," sir, that relates to patrol roads?

A Transmission construction would—that would be part of the transmission construction.

Q Is that defined in your REA Bulletin there?

Q Are those memoranda on the stationery of the United States Department of Agriculture?

A One is, the other doesn't show it.

Q And are both documents documents maintained and kept in the regular course of business of the REA?

A Yes, I recoguize both documents.

Q And are they the kind of documents and memoranda that are maintained in the regular course of business of REA?

A Yes.

Q Is the regular practice of the REA to maintain and keep such documents—

A Yes.

Q —as a permanent business record of the REA?

A Yes.

MR. MILBRATH: Your Honor, at this time I will offer into evidence Exhibits 3 and 4 of Mr. Tanner.

MR. ZITEK: Judge, I object on a couple of grounds. Can we approach a sidebar?

THE COURT: You may. Now, I think they are business (p. 8-133) records and for otherwise admissible and established. If they're relevant, we'll find out.

(Proceedings had at sidebar.)

MR. ZITEK: Judge, these two documents appear to go to try to prove that people in REA were talking to one another about how they were going to handle some of these particular contracts. How, within REA, they were

going to treat these contracts is totally irrelevant to the issues in this case.

The fact is, they have to prove that Seminole abided by these rules and regulations. Mr. Milbrath is trying to create a defense out of nothing.

THE COURT: Well, I don't think you need to go much further.

MR. MILBRATH: Can I respond to that?

THE COURT: No, sir. Let me tell you this, I've ruled on this previously, that's not an issue in this case for the jury, certainly. It may be you offer them, and I'm going to sustain the objection, they're not relevant.

This is not a mortgage foreclosure, this is a criminal prosecution. And, maybe there might be that highly technical argument that something might not have required REA approval in the first place, but we passed that about —well, when I denied the Motion to dismiss, I guess.

MR. MILBRATH: Your Honor, it does bear upon this person's credibility, as well as this person has testified on (p. 8-134) the request of Mr. Zitek that these contracts are subject to REA approval solely on the basis of his experience.

THE COURT: Well, you brought that out, and that's a collateral issue altogether. You're testing his opinion about that. Now, you're testing his experience and his opinion, and I must say, based on the reasoning he's given, I think he's correct, and I think you take the position otherwise. So, I don't think this is a jury issue of credibility. It's not whether he once told somebody black is white and now he's saying white is black, that's credibility.

MR. MILBRATH: I think this is admissible for several reasons, and for the record I'd like to explain why.

THE COURT: You may.

MR. MILBRATH: Number one, these records go to whether or not this witness should be believed by the jury on the issue that the Government has brought; namely, whether or not these contracts, particularly the spreading contract, were subject to REA approval. It is my contention, and I think I'm correct in this, that the jurisdiction of the United States is dependent upon a showing of that—the REA approval was, in fact, required.

This witness has testified purely on the basis of his own speculation. This time the Government did not even bother to protect the record well enough by having the REA Bulletins of record so that the man could at least say he was (p. 8-135) basing his opinion on some particular document. All we have at this time is an unsubstantiated statement that he thinks these were subject to approval. The documents will show, in fact, that there is a dispute within the REA as to whether or not the contracts were subject to approval at all, and I think that's a vital issue from the jurisdiction of—

THE COURT: Well, we're right where we started. I said this was an issue made on a motion to dismiss at the earliest stages of the game. It had no jurisdiction, I denied it. I found as a matter of law they do have jurisdiction, and it's not for the jury to decide that, it's not a jury issue in this case.

You've made your record, you got these letters in. If you think you can persuade somebody some how that the Government had no jurisdiction in this case, of course, it

might be to your advantage. But, it's not going to a jury issue in this case.

MR. MILBRATH: Well, if it's not an issue, then I move to strike this witness's testimony in its entirety and I move for a mistrial.

THE COURT: No, sir, because he's talked about several things.

MR. MILBRATH: I think it woul be inappropriate for this person to testify that there is authority without me testing his believability and credibility by showing that (p. 8-136) they're having a dispute within the REA and he's aware of contrary opinions as to whether or not approval was required.

THE COURT: Let me say this: As far as Seminole is concerned, they were dealing with the REA and its officials, they were bound to take their opinions. If those opinions were wrong, then maybe some court should say so, but certainly not a jury in a case where a man is on trial here.

I've ruled, and that's all there is to it, and you've had your say in the record. Now, you think you're right, I think you're wrong; it doesn't mean that you're going to test your credibility or mine either, it's a matter of opinion. Your idea that you want us to use credibility is simply because you think you can fall back. At any time anything goes bad of credibility, you cross-examine him about it. This is not believability, it has to do with the question of whether he was correct or not correct in his opinion that it was covered.

I read—I heard what he had to say, and it's a—I think it's very logical, and I think his opinion is correct.

I'll sustain the objection. Don't ask me anything about this again. Move on.

MR. MILBRATH: All right. Your Honor,—

THE COURT: That's it.

MR. MILBRATH: Can I just raise one thing?

THE COURT: No, you cannot.

(p. 8-137) MR. MILBRATH: It's a different point.

THE COURT: Nothing else—what else?

MR. MILBRATH: I want to move that REA Bulletin that he testified about in evidence on behalf of Mr. Tanner.

THE COURT: Unless there's more relevance that I can think of, you can supply it as a Court's Exhibit to go forward with the record, not anything for you to discuss with the jury and give your opinion as an REA expert in argument—final argument, if you get to that point.

MR. ZITEK: Judge, I suggest they put in the entire 40-6 Bulletin, the whole thing.

THE COURT: Yes. You may supply the entire thing to go forward as a Court's Exhibit. But, I deny—I find under Rule 403 it's not relevant, it's prejudicial, confusing, et cetera, et cetera. I'm not going to receive it in evidence.

It's up to you to supply it if you want it to go forward with the record. You've got one.

MR. MILBRATH: You mean I can move it in my case?

THE COURT: No, sir. I mean, just give it to the Clerk at sometime outside the presence of the jury.

MR. MILBRATH: Okay.

THE COURT: It's a Court's Exhibit.

MR. MILBRATH: Okay. Thank you.

(End of discussion at sidebar.)

THE COURT: You may proceed. I sustained the (p. 8-138) objection that it's not admissible, it's not relevant to any issue in this case at this trial.

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(DEFENDANT'S EXHIBIT 1 FOR ID.)

United States Department of Agriculture | Rural Electrification Administration | Washington D.C. 20250

July 24, 1981

Mr. Harry W. Wright, Manager
Seminole Electric Cooperative, Inc.
P.O. Box 17100
Tampa, Florida 33682

Dear Mr. Wright:

This is in response to your request for REA to clarify our position with respect to Seminole's need to obtain REA's approval of the limerock and fill dirt contracts.

Under the terms of the REA-Seminole loan contract and implementing REA regulations, Seminole was not required to obtain specific REA approval of either the limerock contract dated November 13, 1980, with Citra Mining, Inc., or the fill dirt contract dated May 14, 1981, with Citrus Sand and Clay, Inc. While REA did receive copies of the contracts and did provide Seminole with comments on the contracts, neither the contracts nor the bidding procedure used in either case required REA approval.

Sincerely,

/s/ Frank W. Bennett
Director
Power Supply Division

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

This is to certify that the foregoing is a true and correct copy of the document on file in my office. Witness my hand and official seal this 8 day of July, 1983.

James F. Taylor, Jr., Clerk

By /s/ Amy Bickford, D.C.

(GOVERNMENT'S EXHIBIT 1-A)

REA Project Designation:

FLORIDA 41A8 SEMINOLE

LOAN CONTRACT

between

SEMINOLE ELECTRIC COOPERATIVE, INC.

and

UNITED STATES OF AMERICA

Dated as of February 12, 1976

UNITED STATES DEPARTMENT OF AGRICULTURE
RURAL ELECTRIFICATION ADMINISTRATION

AGREEMENT, made as of February 12, 1976, pursuant to the Rural Electrification Act of 1936, as amended (7 U.S.C.A. 901 *et seq.*) (hereinafter called the "Act"), between SEMINOLE ELECTRIC COOPERATIVE, INC. (hereinafter called the "Borrower"), a corporation existing under the laws of the State of Florida, and UNITED STATES OF AMERICA (hereinafter called the "Government"), acting through the Administrator of the Rural Electrification Administration (hereinafter called the "Administrator").

WHEREAS, it is intended that the Borrower shall borrow from a legally organized lending agency an amount not in excess of $9,000,000, the repayment of which amount shall be guaranteed by the Government pursuant to the Act, including without limitation the amendment thereof of May 11, 1973 by P.L. 93-32, to finance the construction and operation of an electric system in rural areas, and it is contemplated that the Borrower may from time to time

SECTION 2. The debt created by the Loan shall be evidenced by notes (such notes and any notes executed and delivered to refund, or in substitution for such notes being hereinafter collectively called the "Notes") to be executed by the Borrower when an as the Administrator shall determine, payable to, or to the order of, the appropriate Guaranteed Lender or the Government, as the case may be, in an aggregate principal amount which shall, except as hereinafter otherwise provided, equal maximum amount of the loan herein provided for. The Notes shall be in form and substance satisfactory to the Administrator. If any note shall be executed and delivered to refund, or in substitution for, any of the Notes at the time outstanding, the principal amount of such note may be greater or less than the principal amount of the Note which it refunds or in substitution for which it is delivered and, to that extent, the aggregate principal amount of the Notes shall be greater or less than the maximum amount of the loan herein provided for. Interest shall accrue on the principal of each Note only in respect of amounts which shall have been advanced to the Borrower from time to time on account of the Loan and charged against such Note. For purposes of this agreement, the Government shall be deemed to be the holder of any Note which shall evidence a loan made to the Borrower by a Guaranteed Lender.

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SEC. 5. The Notes shall be secured, as the Administrator shall elect, either by a mortgage made by the Borrower to Government or by a deed of trust made by and between the Borrower and a trustee satisfactory to the

borrow, for purposes permitted by the provisions of the Act, as from time to time amended, additional amounts either (i) from such legally organized lending agency or one or more other legally organized agencies (any such lending agency being hereinafter called a "Guaranteed Lender"), with the repayment of such additional amounts being guaranteed by the Government pursuant to the Act, as so amended, or (ii) from the Government (such amounts and any such additional amounts being hereinafter collectively called the "Loan");

NOW, THEREFORE, for and in consideration of the mutual agreements herein contained, the Borrower and the Government agree as follows:

ARTICLE I

LOAN, NOTES AND SECURITY

SECTION 1. For the purposes of furnishing electric energy to persons in rural areas not receiving central station electric service, (i) the Borrower shall borrow from the Government, and the Government shall lend, an amount not in excess of $0, and/or (ii) the Borrower shall borrow from the Guaranteed Lender and the Government shall guarantee the repayment of, an amount not in excess of $9,000,000 to finance, pursuant to the provisions of the Act, the construction and operation of an electric system (hereinafter called the "System"), consisting of electric generating facilities, electric transmission, distribution and service lines, and all substations, transformers, meters and other equipment necessary for the efficient operation thereof, to be located in the Counties of Citrus and Levy and in counties contiguous thereto, all in the State of Florida.

Administrator (such mortgage or deed of trust, as the case may be, being hereinafter called the "Mortgage"), as supplemented by such supplemental mortgages made by the Borrower to the Government, or by such supplemental deeds of trust made by and between the Borrower and such trustee, as the Administrator shall from time to time require, and the Notes shall also be secured by such chattel mortgages and such supplement or additional chattel mortgages, made by the borrower to the Government, as the Administrator shall from time to time require (any such supplemental mortgage or deed of trust, and any such chattel mortgage, supplemental or additional chattel mortgage, as the case may be, being hereinafter called a "supplemental mortgage"). The Borrower shall also take such other action as the Administrator shall from time to time require to perpetuate or renew the lien of the Mortgage, or any supplemental mortgage. The Mortgage and all supplemental mortgages, if any, shall be in form and substance satisfactory to the Administrator and collectively shall cover all the property of the Borrower now owned or hereafter acquired.

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ARTICLE II

ADVANCES AND DISPOSITION OF FUNDS

SECTION 1. The Borrower shall deliver to the Government, when directed by the Administrator and subject to his approval, the following:

(a) one or more of the Notes, the Mortgage and such supplemental mortgages as the Administrator shall require, all duly executed, and accompanied by proof of the due recordation and filing of

the Mortgage and any supplemental mortgage in every appropriate office in each county specified by the Administrator;

(b) evidence of appropriate corporate action authorizing the execution and delivery of the Notes, the Mortgage, and any supplemental mortgage and amendment to this agreement;

(c) evidence that the Borrower has duly registered when and where required by law with all State and Federal authorities and obtained therefrom all authorizations, permits, and approvals to the extent required by law in order to enable the Borrower validly to execute and deliver the Notes, the Mortgage, and any supplemental mortgage and amendment to this agreement; and

(d) such opinions of counsel, who shall have been previously approved by the Administrator, as the Administrator shall require.

SEC. 2. The Borrower shall from time to time submit to the Administrator requisitions in such form and detail as the Administrator shall prescribe requesting the Government to make advances or cause advances to be made on account of the Loan. Each requisition shall be accompanied by the following:

(a) evidence satisfactory to the Administrator that the construction of the System to the date of the requisition complies with the provisions hereof;

(b) a certificate of the treasurer of the Borrower which shall specify (1) all payments not previously accounted for therefore made by the Borrower from funds advanced by, or caused to be advanced by, the Government on account of the Loan, and (2) all unpaid obligations of the Borrower:

(c) a statement, in such form and detail as the Administrator shall prescribe, setting forth the pur-

poses for which it is intended the requested advance will be used by the Borrower; and

(d) such information, opinions, documents, and proofs in addition to the foregoing as may reasonably be requested by the Administrator.

SEC. 3. The Government, upon receipt of a requisition and accompanying documents complying with the provisions of section 2 of this article II, shall, within a reasonable time thereafter, if the Borrower has complied with the provisions of section 1 of this article II to the satisfaction of the Administrator, make an advance, or cause an advance to be made, to the Borrower sufficient for such of the purposes specified in the statement of purposes accompanying the requisition as the Administrator shall approve. The Administrator may at any time, as a condition to the making or approving of any advance on account of the Loan, require compliance by the Borrower with any one or more of the terms and covenants of this agreement to be performed by the Borrower. Advances made by, or caused to be made by, the Government pursuant to this article II shall be charged by the Government against any one or more of the Notes in such manner and in such amounts as the Administrator shall determine. The Government shall be under no obligation to make or cause to be made advances on account of the Loan after the date of the closing of the Loan specified in the loan closing certificate.

SEC. 4. The Borrower shall hold all moneys advanced to it hereunder in trust for the Government and shall deposit such moneys promptly after the receipt thereof in a bank or banks which shall have been approved by the Administrator. Any account (hereinafter called

"Special Construction Account") in which any such moneys shall be deposited shall be designated by the corporate name of the Borrower followed by the words "Trustee, Special Construction Account." Moneys in any Special Construction Account shall be used solely for the construction and operation of the System and, subject to the provisions of section 5 of article III and section 2(c) of article V hereof, may be withdrawn only upon checks, drafts, or orders signed on behalf of the Borrower and countersigned by an executive officer thereof. The Borrower shall not deposit or allow to remain on deposit any of its funds, regardless of the source thereof, in any bank or other depositary after notification by the Administrator to the effect that such bank or other depositary is not satisfactory.

SEC. 5. The Borrower shall expend each advance on account of the Loan only for such of the purposes specified in the statement of purposes accompanying the requisition for such advance as shall have been approved by the Administrator.

SEC. 6. Any funds advanced on account of the Loan remaining unexpended in any Special Construction Account upon the closing of the Loan shall be forthwith remitted by the Borrower to the Government and a credit in respect thereof allowed against any one or more of the Notes to be designated by the Administrator.

SEC. 7. No advances will be made on account of the Loan for the construction of any part of the System with respect to which the Borrower shall have failed to submit to the Government evidence satisfactory to the Administrator that the Borrower has obtained from the

appropriate agency or agencies of the Government all necessary orders or approvals with respect to the use of the materials required for the construction of such part of the System. No construction shall be undertaken except in accordance with authorizations or regulations of any such agency or agencies having jurisdiction in the premises.

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ARTICLE III

CONSTRUCTION

SECTION 1. The Borrower shall cause the System to be constructed under contract by a responsible contractor or contractors, except to the extent that the Administrator shall permit the Borrower to construct by force account portion or portions of the System, or to acquire existing facilities to be included in the System. The term "force account" shall mean that the prosecution of construction work by the Borrower on its own account and the furnishing by the Borrower of all labor transportation, materials, tools, supplies, and equipment used in connection therewith. Force account construction shall be prosecuted and the acquisition of existing facilities shall be made subject to such terms and conditions as the Administrator shall prescribe and the Borrower shall kep accurate and detailed records of all costs and expenses in connection therewith. The System shall be constructed in such sections as the Administrator shall direct.

SEC. 2. The System shall be constructed in accordance with the approved plans and specifications hereinafter provided for, the provisions of this agreement, and all contracts and subcontractors made pursuant hereto. Con-

struction of the respective sections of the System shall be commenced promptly after the Government shall have notified the Borrower to commence such construction, and the Borrower shall cause such construction to be prosecuted diligently and to be completed within such reasonable time as the Administrator shall prescribe, unless prevented from so doing by cause beyond the control and without the fault or negligence of the Borrower, including fires, floods, strikes, and unusually severe weather conditions. The Borrower shall cause the System to be completed free and clear of all liens and lawful claims for liens except the liens of the Mortgage, and any supplemental mortgage.

SEC. 3. The Borrower shall, if the Administrator shall so require, invite bids for construction work pertaining to the System, and for materials, equipment, or supplies to be used therein, and the Borrower shall include all persons designated by the Administrator among those invited to submit bids. If the Administrator shall so require, the Borrower shall open bids in the presence of a representative of the Administrator and, in any event, the Borrower shall open all bids publicly at the time and place which shall have been specified in the notice to bidders. The Borrower shall award each contract to the lowest responsible bidder, unless all bids are rejected or the Administrator shall approve the award of the contract to another responsible bidder upon a showing that the award of the contract to such bidder is in the best interests of the Borrower.

SEC. 4. The Administrator may supervise the construction and equipment of the System, and shall have the right to inspect, examine, and test all work and materials

relating thereto, and the Borrower shall provide reasonable facilities therefor for the use of the Administrator and his agents. The Administrator may reject any defective material or workmanship and require that any such material shall be satisfactorily corrected.

SEC. 5. If the construction of the System or any section or sections therefor, shall not proceed in accordance with the terms hereof, the Administrator may appoint a supervisor (hereinafter called the "Supervisor") for the System, or such section or sections thereof as the Administrator shall designate, as the representative of the Government and notify the Borrower of such appointment and the duration thereof. Upon the appointment of a Supervisor, the employment of all superintendents and managers of the System and of all associate and assistant superintendants and managers thereof shall be forthwith terminated. The Borrower shall with all reasonable instructions of the Supervisor incident to the carrying out of the obligations of the Borrower hereunder, including, without limitation, directions pertaining to the termination of the employment of such employees of the Borrower as shall be designated by the Supervisor. The Supervisor may employ such persons as he may deem necessary to assist him in carrying out his functions. The salaries, fees, disbursements and expenses of the Supervisor and of any employee appointed by him shall be paid by the Borrower, provided, however, that the salaries, fees, disbursements and expenses of any Supervisor who shall be an employee of the Government and of any assistants who shall be employees of the Government shall not be payable by the Borrower unless and to the extent that the Administrator, upon written notification to the Borrower, shall so require. So long

as the appointment of the Supervisor shall be in effect, all checks, drafts and orders drawn on any Special Construction Account shall be countersigned by the Supervisor, except that if the proper officers or employees of the Borrower without the requirement of any other signature thereon if the Supervisor shall certify that the check, draft or order is required to carry out the obligations of the Borrower hereunder. The Borrower hereby constitutes the Administator its agent for the purchase of notifying any bank in which any Special Construction Account shall be maintained of the appointment of a Supervisor and of the provisions hereby with respect thereto and agrees that such notice shall include a direction to any such bank with respect to the signing or countersigning of checks, drafts, or orders drawn on any such Special Construction Account as in this section 5 provided.

SEC. 6. The Borrower shall, at such time as the Administrator shall determine, furnish to the Government (a) such certificates of the approved engineer or engineers and of the officers and employees of the Borrower as the Administrator shall require with respect to construction of the System, or any section thereof, and the cost thereof, and (b) a complete and detailed engineering and legal description of the System, or any section thereof, including a map or maps, in form satisfactory to the Administrator, showing the location and classification of all generating plants (if any), lines, substations, and transformers.

ARTICLE IV

PARTICULAR COVENANTS

SECTION 1. The Borrower shall designate, subject to the Administrator's approval: (a) a bank or banks (which must be a member or members of Federal Deposit Insurance Corporation) in which the funds of the Borrower, regardless of the source thereof, shall be deposited; (b) one or more engineers who shall perform the engineering services involved in the construction of the System, or the several sections thereof, and execute all cerificates and other instruments pertaining to engineering details required hereunder to be delivered to the Government; and (c) a person who shall act as the superintendent of the (the approved superintendent being hereinafter called the "Superintendent"). If the Administrator shall so require, the Borrower shall designate, subject to the approval of the Administrator, one or more associate or assistant superintendents, and a chief operator, engineer or other employees to have active charge of any generating plant or plants or any transmission line or lines forming a part of the System.

SEC. 2. The Borrower shall submit, when the Administrator shall so require and subject to the Administrator's approval: (a) plans and specifications for the construction of such section or sections of the System as shall be designated by the Administrator, identified by the signature of the approved engineer for such section or sections, and, if the Administrator shall so require, certified by the secretary of the Borrower as having been approved by the board of directors thereof; (b) a contract or contracts for the construction of the section or sections of the

System designated by the Administrator; (c) a contract or contracts for the purchase of materials, equipment, and supplies for use in connection with the construction or operation of the System; (d) contracts with approved engineers for all necessary engineering services in connection with the construction of the several sections of the System; (e) a contract or contracts for a supply of electric energy insofar as such supply may be necessary for the operation of the System or any part thereof; (f) a contract or contracts for the acquisition of existing facilities to be included in the System; and (g) an option or options, or a contract or contracts, as the case may be, for the purchase, lease or other acquisition of a parcel or parcels of land in connection with the construction or operation of the System, or any part thereof, if the Administrator shall so require.

SEC. 3. The Borrower shall not enter into any contract for (a) the construction of any portion of the System; (b) engineering or other services pertaining to the construction or operation of the System; (c) the purchase, with funds advanced on account of the Loan, of materials, equipment, or supplies for use in connection with the construction or operation of the System; (d) electric energy with which to operate the System or any part thereof; (e) the sale of electric at wholesale; (f) the acquisition of existing facilities to be included in the System; or (g) the purchase, lease or other acquisition of a parcel or parcels of land in connection with the construction or operation of the System, unless the effectiveness of each such contract shall be conditioned upon the approval of the Administrator; provided, however, that contracts of the nature described in subdivision (c) of this Section 5 for amounts not in excess of $100 in individual instances and in the aggregate not in

excess of one per centum (1%) of the amount specified in section 1 of article 1 hereof shall not require the prior approval of the Administrator.

SEC. 4. The Borrower shall take out, at the time the respective risks are incurred, and maintain, at all times until the completion of the System, insurance of such classes and in such amounts as the Administrator shall have determined to be advisable to safeguard the interest of the Borrower and the Government. The Borrower shall submit to the Administrator a schedule of the insurance which it porposes to take out and following the Administrator's approval thereof shall deliver to the Government, subject to the approval of the Administrator, originals or duplicate originals of policies effecting such insurance or certificates in respect thereof. The Borrower shall from time to time make such changes in such insurance as the Administrator shall determine to be advisable. In the event that the Borrower shall fail to take out or maintain insurance determined by the Administrator to be advisable as aforesaid, the Administrator may take out such insurance on behalf of the Borrower and the Borrower shall pay the cost thereof. Nothing herein contained shall limit the obligation of the Borrower to take out and maintain insurance pursuant to the provisions of the Mortgage, and any supplemental mortgage.

* * *

SEC. 7. The Borrower shall at all times keep, in accordance with good accounting practice, and shall safely preserve, proper books, records, and accounts in which full and true entries shall be made of all dealings, business, and affairs of the Borrower in connection with the use and application of funds advanced to the Borrower on account of

the Loan. The Government, through its agents, representatives, accountants, or attorneys, shall at all times during reasonable business hours have access to and the right to inspect and to make copies of all such books, records, and accounts, and all invoices, contracts, leases, pay rolls, canceled checks, statements, plants, specifications, drawings, and other documents and papers of every kind belonging to or in the possession of the Borrower in anywise pertaining to the System or the construction thereof.

SEC. 8. The Borrower shall perform all covenants by it to be performed under the Mortgage and any supplemental mortgage.

SEC. 9. The Borrower shall forthwith, upon receipt thereof, deliver to the Administrator any contractor's or subcontractor's bond or bonds relating to the construction of the System.

SEC. 10. The Borrower shall not operate or energize any portion of the System until the Borrower shall have furnished evidence satisfactory to the Administrator that (a) such portion of the System has been properly constructed and is ready to be operated or energized, (b) there are sufficient consumers ready to take service to permit the enonomical operation of such portion of the System, and (c) the Borrower has complied with the provisions of section 4 of this article IV in respect of such portion of the System. The Borrower shall not serve any consumer through the System until the Borrower shall have furnished evidence satisfactory to the Administrator that such consumer's premises have been properly wired.

SEC. 11. The Borrower represents and warrants as follows: (a) it is a corporation duly organized, existing,

and in good standing under the laws of the State specified in the introductory paragraph of this agreement and has corporate power to enter into this agreement and perform every act required to be performed by it hereunder; (b) all proceedings prerequisite to the valid execution of this agreement by it have been duly taken and all required authorizations therefor have been secured; (c) the status of the Borrower in respect of litigation and other legal proceedings is as set forth in an opinion of the Borrower's counsel to be submitted at such time or times as the Administrator may require; (d) it has not entered into any contract for the construction of any portion of the System, or for engineering or other services pertaining to the construction or operation of the System, or for the acquisition of existing facilities to be included in the System, or, except as permitted by any agreement or agreements between the Government and the Borrower, for the purchase, with funds advanced or to be advanced on account of the Loan, of materials, equipment, or supplies for use in connection with the construction or operation of the System, unless such contract has been approved by the Administrator or the effectiveness thereof has been made subject to the approval of the Administrator; and (e) every statement contained in this agreement and in every other document, statement, certificate, and opinion submitted to the Government by it or in its behalf is true and correct.

• • •

SEC. 15. The Borrower shall, whenever requested so to do by the Administrator, submit evidence satisfactory to the Administrator of the economic and engineering feasibility of each part of the System designated by the Administrator. If the Borrower shall fail to submit such evidence with respect to any such part, the Government may refuse to make, or cause to be made, any advance or further advances hereunder or the Administrator may determine that such part shall not be constructed and in such even the Borrower shall not construct such part. Any determination by the Administrator hereunder shall be conclusive and binding upon both the Government and the Borrower.

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ARTICLE V

EVENTS OF DEFAULT AND REMEDIES

SECTION 1. The happening of any of the following events (hereinafter called "events of default") shall constitute a default by the Borrower hereunder:

(a) any failure to perform or any violation of, any term, covenant, promise, condition, or agreement on the part of the Borrower to be performed hereunder at the time and in the manner herein provided;

(b) any breach of any warranty or any material or substantial inaccuracy in any representation on the part of the Borrower; or

(c) any event of default which is specified in the Mortgage or any supplemental mortgage.

SEC. 2 Upon the happening of any event of default, as specified in section 1 of this article V, the Government or the holder or holders of any one or more of the Notes, as their respective interests may appear, may exercise any one or more of the following rights, privileges, powers, and remedies, to the extent that the exercise thereof is not prohibited by law:

(a) refuse to make, or cause to be made, any advance or any further advances on account of the Loan, but any thereafter made, or caused to be made, by the Government shall not constitute a waiver of such default;

(b) declare all unpaid principal of and all interest accrued on any or all of the Notes held by such holder or holders to be due and payable immediately and upon such declaration all such principal and interest shall become due and payable immediately, anything herein or in any other agreement to which the Borrower shall be a party, or in the Notes or in the Mortgage or any supplemental mortgage to the contrary notwithstanding;

(c) enter upon and take possession of the System, take possession of and utilize any and all equipment, materials, tools, supplies, and appliances wherever located belonging to the Borrower, take possession of any funds in any Special Construction Account, take possession of all books, papers, records, documents, accounts, and plans and specifications of the Borrower relating to the System, and complete or cause to be completed, by contract or otherwise, the construction of the System, or such portion thereof as the Administrator may select, for the account of the Borrower, and the amount paid therefor by the Government shall be considered an advance on account of the Loan and if said amount, together with prior advances, is in excess of the maximum amount which the Government would otherwise be required to advance, or cause to be advanced, hereunder the Borrower shall immediately pay to the Government the amount of such excess; or

(d) exercise any and all rights, privileges, remedies, powers, claims, and demands which the Borrower may have against third persons in any way relating or pertaining to the construction of the System and for such purpose, the Borrower does hereby assign, transfer, and set over to the Government any and all such rights, privileges, remedies, powers, claims, and demands, except such as by law are not transferable or assignable, which the Borrower hereby agrees to hold, together with any and all proceeds resulting therefrom, in trust for the benefit of the Government and the holder or holders of the Notes, as their respective interests may appear.

SEC. 3. Every right, privilege, power, or remedy herein or in the Notes or in the Mortgage or any supplemental mortgage conferred upon or reserved to the Government or any holder or holders of the Notes shall be cumulative and shall be in addition to every other right, privilege, power, and remedy now or hereafter existing at law or in equity or by statute. The pursuit of any right, privilege, power or remedy shall not be construed as an election.

* * *

IN WITNESS WHEREOF, the Borrower has caused this agreement to be signed in its corporate name and its corporate seal to be hereunto affixed and attested by its officers thereunto duly authorized, and the Government

has caused this agreement to be duly executed, all as of the day and year first above written.

SEMINOLE ELECTRIC
COOPERATIVE, INC.

by /s/ V. G. Erieland
President

(Seal)

Attest: /s/ Leon E. Weaver
Secretary

UNITED STATES OF AMERICA

by /s/ David A. Hamil
Administrator
of
Rural Electrification Administration

(GOVERNMENT'S EXHIBIT 1-E)

SEMINOLE ELECTRIC
COOPERATIVE INCORPORATED

(For Interoffice Use)

TO: General Service Employees DATE: April 24, 1980
FROM: Joe Casey

SUBJECT: *NEW COMPANY POLICIES*

Attached is a copy of the new and revised company policies as approved by the Committee on April 10, 1980. Please read these policies over carefully. After you have done so, please initial and pass on to the next employee — when completed, return to Joe Casey. Thank you.

[Names deleted in printing.]

SEMINOLE ELECTRIC COOPERATIVE, INC.
POLICY NO. 203 DATE: 4/10/80

CONFLICT OF INTEREST

I. OBJECTIVE

To spell out those areas where the Trustees, or Employees of Seminole Electric Cooperative should avoid conflicts of interest, or any appearance of conflict of interest, so that the affairs of Seminole Electric Cooperative will always be carried out in a business like and ethical manner.

II. CONTENT

A. The following guidelines shall apply to both the Trustees and Employees of SECI:

1. Trustees and employees are prohibited from receiving gifts, fees, loans, or favors from suppliers, contractors, consul-

tants, or financial houses, which obligates or induces them to compromise their responsibilities to negotiate, obligate, inspect or audit, purchase or award contracts, with the best interest of SECI uppermost in mind. This does not prohibit receiving gifts or favors of nominal value or casual entertainment which meets all standards of ethical business conduct, and involve no element of concealment.

2. The complete confidentiality of business information must be respected at all times. Employees and Trustees are prohibited from knowingly disclosing such information to those who do not have the need to know, both inside and outside the organization; or in any way using this information for personal gain or advancement; or to individually conduct negotiations or make contacts or inquiries on behalf of SECI, unless officially designated to do so.

3. Employees and Trustees are prohibited from acquiring or having a financial interest in any property which SECI acquires or a direct or indirect financial interest in a supplier, contractor, consultant or other entity with which SECI does business. This does not prohibit the ownership of securities in a publicly-

owned company except in a substantial amount[1] by those in a position to materially influence or affect the business relationship between SECI and such publicly-owned company. Any other interest in or relationship with an outside organization or individual having business dealings with SECI is prohibited if this interest or relationship might tend to impair the ability of the employee or Trustee to serve the best interests of SECI. If members of the immediate family of an employee or Trustee, as defined in the policy on Nepotism, have a financial interest as specified above, such interest shall be fully disclosed to the Board of Trustees which shall decide if such interest should prevent SECI from entering into a particular transaction purchase or employment of services.

4. Every Trustee and Employee of SECI is expected to avoid situations which might be construed as conflicts of interest since it is not feasible in a policy statement such as this to describe all the circumstances and conditions that might be or have the potential of being considered conflicts of interest.

POLICY NO. 203 DATE: 4/10/80

III. RESPONSIBILITY

A. Each Trustee shall make every reasonable effort to comply with the letter and spirit of this policy.

B. The General Manager shall make every reasonable effort to inform all employees about the content of this policy and make every reasonable effort based on the information available to him to see that it is complied with and report to the Operations Committee semi-annually on how this policy is being carried out.

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[1] As a minimum standard, a significant financial interest is an interest of more than: (1) 1% of any class of outstanding securities in a company and (2) 5% interest in a partnership or association. Additionally, significant financial interest means any financial interest which may influence the judgement or action of any director, officer, or employee with respect to this company.

(COURT'S EXHIBIT, TR. 8-137)

UNITED STATES DEPARTMENT OF AGRICULTURE
Rural Electrification Administration

August 24, 1970
Supersedes 11/27/59

REA BULLETIN 40-6

SUBJECT: Construction Methods and Purchase of Materials and Equipment.

I. *Purpose:* To set forth Rural Electrification Administration policy and procedure with respect to construction of distribution, transmission, generation, and headquarters facilities, and the purchase of materials and equipment by electric borrowers with loan funds or general funds.

II. *General:*

A. It is the responsibility of each borrower as owner of its system to determine the methods of construction and of purchase of materials and equipment which are best suited to its needs. However, it is recognized that from the viewpoint of (1) protecting the security interests of the Government's loans, and (2) accomplishing the statutory objective of a sound program of rural electrification, *REA is properly concerned that the costs of construction, materials, and equipment are reasonable and within the limits of economic feasibility and that the physical properties constituting the security for loans are constructed adequately to serve the purposes for which they are intended.*

B. This bulletin outlines general requirements and procedures in conection with new construction and additions to plant whether financed with loan funds or general funds. Electric system construction is a continuing activity and both loan funds and general funds are often used concurrently. Adherance to the requirements and procedures in this bulletin will facilitate the consideration of loan applications which may include amounts for the reimbursement of general funds with loan funds.

C. REA may make exceptions to the requirements and procedures in this bulletin since it is not possible to foresee and include all the types of situations and conditions which can arise. Borrowers are urged to work with REA in individual instances when such exceptions are necessary or desirable.

D. Engineering studies and reports, such as construction work plans and engineering support for loan applications, provide REA with the basic for proper evaluation of the indicated need for the construction of borrowers' distribution, transmission and generation facilities. When proper studies have not been made or when existing studies are obsolete, arrangements should be made for an up-to-date study.

III. *Policy:*

A. *Selection of Methods of Construction:* In determining whether construction shall be performed by contract or force account, borrowers should weigh carefully the relative advantages and disadvantages of both methods in regard to the specific construction to be performed. For project-type construction, experience has indicated that the contract method of construction, with the contract awarded on the basis of competitive bidding, will generally provide for the construction of facilities in the shortest time at the lowest overall cost. *Except for major construction projects where it is evident that the contract method of construction is preferable, REA will not in any individual instance recommend one method in preference to the other. The method selected by the borrower is subject to the approval of REA.*

B. *Standards, Specifications and General Requirements*:

1. Materials or equipment and construction must not be below the minimum requirements of the standards and specifications established by REA. Materials and equipment for distribution and transmission facilities meeting these standards are included on the "List of Materials Acceptable for Use on Systems of REA Electrification Borrowers," REA Bulletin 43-5.

2. If operating conditions or requirements make the use of non-standard construction, materials or equipment necessary or desirable, the borrower should receive approval of the REA Area Director, or Director, Power Supply, Management and Engineering Standards Division, prior to the purchase of materials and equipment or commencement of construction (REA Bulletin 44-7).

3. Construction work or the purchase of materials and equipment which is to be financed initially or the cost of which is to be reimbursed in whole or in part with REA loan funds shall be in accordance with the applicable equal employment opportunity provisions (REA Bulletin 20-15).

4. Only new materials and equipment shall be purchased unless otherwise approved by REA in specific instances.

5. All purchases of materials and equipment are subject to the "Buy American" provision (REA Bulletin 43-9).

C. ***REA Approval of Borrowers' Construction:***

1. *Distribution Facilities* which are included in approved loans, or are included in construction work plans approved by the

REA field engineer, or are to be financed with general funds and meet the provisions of REA Bulletin 103-2, may be constructed without further REA approval except that the REA field engineer should approve design data, drawings, and plans and specifications as may be appropriate for:

a. New substations or structural changes in existing substations.

b. Lines or other facilities to serve large power loads (REA Bulletin 112-6), and

c. Nonstandard distribution construction.

2. *Transmission Facilities.* Prior to the construction or modification of transmission facilities, the REA field engineer (or Power Supply, Management and Engineering Standards Division for power supply borrowers) should approve design data, drawings, plan and profile and plans and specifications as may be appropriate for transmission lines or substations.

3. *Generation Facilities.* Prior to the construction or modification of generating facilities that involves an estimated expenditure of $50,000 or more, the REA Area Office (or Power Supply, Management and Engineering

Standards Division for power supply borrowers) should approve design data, drawings, plans and specifications as may be appropriate.

4. ***Headquarters Facilities.*** Prior to the construction or remodeling of headquarters facilities that involves a total estimated expenditure of $25,000 or more during any year, the REA Area Office should approve preliminary and final plans and specifications (REA Bulletin 86-3).

5. Requirements concerning REA approval of plans and specifications and contracts for the purchase of materials and equipment and for construction are summarized in the enclosed Exhibit I.

D. *Competitive Bids*: Experience has demonstrated the desirability of formal competitive bidding in the construction of facilities and in the purchase of materials and equipment. In some instances, as set forth in Sections IV and

VI below, REA requires that formal competitive bids be taken on construction to be performed under a construction contract and on generation materials and equipment to be purchased under a materials or equipment

contract. When competitive bidding is not required, REA still recommends that, in general, borrowers use the competitive bidding method for construction of their facilities and for procurement of materials and equipment. Where competitive bidding is required, deviations from the requirement will be made by REA only in individual instances, upon showing by a borrower that some other procedure would better serve its interest. Where competitive bids are taken, the contract must be awarded to the lowest responsible bidder on the basis of the lowest bid unless all bids are rejected or unless the borrower can show that the award of the contract on the basis of other than the low bid is in its best interest.

IV. *Purchase of Materials and Equipment:*

A. *Distribution and Transmission Materials and Equipment:*

Distribution and transmission materials and equipment may be purchased by formal competitive bids or informal quotations. These purchases may be made by contract or purchase orders not subject to REA approval, and copies of such contracts or purchase orders should not be sent to REA. When purchases are made by informal quotations rather than formal competitive bids, at least three such informal quotations should be obtained.

B. *Generation Materials and Equipment:*

1. Generation materials and equipment amounting to $50,000 or more shall be purchased by formal competitive bids on a contract subject to REA approval. The bidding documents (plans and specifications and form of contract) are subject to REA review and approval prior to issuance to suppliers. Three copies of contracts for materials or equipment, a tabulation of the bids, the engineer's recommendation, and a copy of a board resolution indicating the board's action should be sent to REA. Two copies of contracts approved by REA will be returned to the borrower.

2. Generation materials and equipment amounting to less than $50,000 may be purchased by formal competitive bids or informal quotations. These purchases may be made by contract or purchase order not subject to REA approval. One copy of such contracts or purchase orders should be sent to REA for its records.

C. *General Plant Materials and Equipment:*

General plant materials and equipment may be purchased by formal competitive bids or by informal quotations. Purchases may be

made by contract or purchase order not subject to REA approval and copies of such contracts or purchase orders should not be sent to REA.

V. *Biding Procedures:* When competitive bids are taken for the construction of facilities or the purchase of materials or equipment, it is essential that the arrangements prior to the bid opening are suitable and the bid opening is conducted properly. This will assure that all bidders are treated fairly and no bidder is placed in an advantageous or disadvantageous position with respect to the other bidders, and that the advantages of the competitive system of bidding are maintained for all borrowers. The following outlines some of the major considerations in arranging for competitive bids and in conducting bid openings. This is not intended to be a complete list as it is to be expected that unusual problems and situations may arise under various circumstances. In reference to headquarters facilities "architect" should be substituted for "engineer."

A. *Bid Opening Date:* The bid opening date should be scheduled by the borrower with the advice of its engineer. Sufficient time should be available to prospective bidders to prepare their bids and, when necessary, examine the site of the project. Usually a two to four week period between the time plans and specifications are available and the bid opening is sufficient, with the longer period asso-

ciated with large and complex construction projects or equipment. If possible, the bid opening should be scheduled for the middle or end of the week rather than on Monday or Tuesday. It usually is desirable to advise prospective bidders of an anticipated bid opening approximately two weeks before plans and specifications are ready for release.

B. *Invitations to Bid:* The borrower's engineer is responsible for sending out invitations to prospective bidders, informing trade associations of scheduled bid openings and any other action necessary to procure full, free and competitive bididng. For line construction at least 12 contractors should be invited to bid. For other types of construction and for the procurement of materials and equipment, the number of invitations may depend upon the type of work to be performed, the type of materials or equipment to be furnished, and the location of the project. In any event, however, sufficient invitations should be sent out to assure adequate competition and so that at least three bids will be received. If less than three bids are received paragraph I below shall apply. Subject to the foregoing criteria, the determination of how many and which bidders shall be permitted to bid will be the responsibility of the borrower.

C. *Receipt of Bids*: The date and time of receipt by the borrower should be indicated on

the outside envelope of all bids, including letters or telegrams modifying bids. In general any bid received subsequent to the time specified for opening bids should be returned to the bidder unopened with a notation as to the date and time of receipt. Individual situations may require a determination as to whether a delay in delivery of a bid is beyond the control of the bidder.

D. *Qualifying Bidders*: If the notice and instructions to bidders requires that bidders show evidence of meeting certain requirements, the borrower, with the advice of the engineer, should qualify bidders before any bids are opened. This should be done as far as possible in advance of the time scheduled for opening of bids. The bids of unqualified bidders are to be returned unopened.

E. *Conduct of Bid Openings*: Bid openings should generally be conducted by the borrower's engineer in the presence of bidders with a representative of the borrower also present. It usually will be desirable to have the borrower's attorney present at the bid opening.

F. *Review of Bids:* At the time bids were opened, the borrower's engineer and attorney should review all bids for irregularities, errors, and exceptions. If it appears that minor irregularities or errors were made through inadvertence, the borrowe may (1) authoize

the bidder to make changes, or (2) waive the the errors or irregularities. In the event of major irregularities or errors, the bid should be rejected and the bid price not disclosed. The bid bonds or certified checks also should be checked for adequacy prior to reading bids.

G. *Reading of Bids:* Bid prices should not be read until the engineer and attorney have reviewed each bid to determine if there are any exceptions, alternatives, or other factors that may affect the bid price or recommendation as to award. These exceptions should be made public at the same time the bid price is announced. The order of reading bids should be determined by the engineer. For example, the bids may be read in the order received or alphabetically by name of bidders.

H. *Evaluating Bids:* If factors other than the dollar value of the bids are to be considered, such factors should be stated in the notice and instructions to bidders. If a bid contains an escalation or price adjustment clause, the maximum amount of escalation or adjustment must be added to the base bid for purposes of evaluating bids to determine the low bidder. Any bid that does not contain a price ceiling should be rejected.

I. *Procedure When Less than Three Bids are Received:* If fewer than three bids are received, the borrower with the advice of its engineer, should determine whether the bids are to be opened or returned unopened. If the bids are opened, and the borrower desires to award a contract on the basis of less than three bids, approval of the Area Office (or Power Supply, Management and Engineering Standards Division for power supply borrowers) should be obtained prior to executing any contract that is subject to REA approval.

J. *Bid Rejections:* In the event that no bid can be approved, all bids are to be rejected and the borrower should either advertise for new bids or make other arrangement for construction or purchase of materials or equipment.

All bids should be rejected under conditions such as:

1. Acceptable prices not quoted.
2. Varying interpretations resulting from ambiguity in the specifications, or
3. An insufficient number of bona fide bids received.

Any bid may be rejected if:

1. It is an unbalanced bid.
2. The bidder is not qualified in accordance with the instructions to bidders, or
3. The facts indicate the bidder has an interest conflicting with that of the borrower.

K. *Recommendation of Engineer:* In most instances, at the conclusion of the bid opening the engineer will be in position to make known his recommendation as to award. In some instances it may be preferable to adjourn the bid opening for a sufficient period of time for the engineer to complete his tabulation, analysis, and evaluation of the bids. If possible, the recommendation of the engineer should be announced when the bidders have reassembled at the time specified by the engineer. The engineer should furnish each bidder with a copy of his tabulation of the bids.

L. *Award of Contract:* It is desirable that a board meeting be scheduled promptly following the bid opening. The board may then take prompt action on the engineer's recommendation, and decide on the award and manner of executing the contract. For contracts subject to REA approval, a borrower may award a contract on standard contract forms without REA approval of the award if:

1. The proposal was made on plans and specifications approved by REA if such approval is required,

2. A minimum of three qualified bids were received and opened,

3. The bid contains no irregularities other than minor ones which may be waived, and

4. The award is made to the lowest responsible bidder.

Contracts subject to REA approval awarded in accordance with the foregoing, properly examined by the borrower's attorney and engineer and properly executed by the borrower and contractor, are to be submitted in triplicate to REA together with:

1. A tabluation of the results of all bids.

2. A written recommendation of borrower's engineer,

3. An executed contractor's bond on an REA form of bond. (See REA Bulletin 40-2, "Insurance Coverage for Borrowers' Contractors and Engineers and Performance Bond Requirements for Borrowers' Contractors)," and

4. A copy of the board resolution awarding the contract.

An information copy of contracts not subject to REA approval properly executed and in accordance with the foregoing should be sent to REA for its records.

VI. *Procedure in Construction by Contract:*

A. *General:*

1. Under this method, the construction is performed by an independent contractor

who has entered into a contract with the borrower. The contract may have been awarded on the basis of formal competitive bids, informal quotations, or negotiation.

2. Prior to entering into any construction contract, plans and specifications prepared by the borrower's engineer should be approved by the borrower's board of directors. For certain types of construction the plans and specifications are to be submitted to REA for approval (See Exhibit 1).

3. If any materials or equipment are to be furnished by the borrower, they are purchased by contract or purchase order. For project-type construction, experience has indicated that a labor and materials type of construction contract, with the contractor furnishing the materials and equipment will minimize scheduling difficulties and generally result in the lowest overall cost.

4. For substations, generating plants or building sites, when REA approval of title evidence is required (See REA Bulletin 20-3, "Obtaining Adequate Right-of-Way and Submission of Title Evidence by Electric Borrower") such approval

should be obtained prior to releasing plans and specifications for bids or contract negotiation. Contracts subject to REA approval or requests for loan funds cannot be approved until such title evidence has been approved.

5. After bids are received or negotiations completed a construction contract is entered into between the borrower and contractor. For contracts subject to REA approval (See Exhibit I) three copies of the contract and a copy of the board resolution should be forwarded to REA. For contracts executed on REA standard forms of contracts which are not subject to REA approval, one copy should be sent to REA for its information and records.

6. Under certain engineering services contracts, borrower's engineer is responsible for preparing and distributing periodical reports of progress. (See REA Bulletin 80-11, "Reports of Progress of Construction and Engineering Services.")

7. During the construction period the contractor is paid monthly for completed work in accordance with the terms of the contract.

8. On completion of construction final inspection is made and final inventory doc-

uments are prepared. For project-type construction the close-out procedures are in REA Bulletin 81-6, "Close-out Documents for Electric System Construction Contracts," REA Bulletin 85-1, "Close-out Documents for Generation Projects," and REA Bulletin 86-1, "Final Documents Required in Connection with Construction of Buildings."

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B. *Negotiated Construction Contracts:*

1. For the construction of certain facilities the borrower may determine that it is in its best interest to negotiate a contract rather than contracting on the basis of formal competitive bids. This may be desirable when the magnitude of the construction would not attract sufficient interest among contractors, the construction may include extensions and additions to the system over a period of time and the exact type and extent of the construction may not be known at the beginning of construction, or the construction may not be easily definable for bidding purposes such as work involving combinations of construction, rehabilitation and mainteance. Borrowers may execute negotiated contracts without prior REA approval:

a. For distribution or transmission facilities if the maximum contract amount does not exceed $100,000, exclusive of the value of owner-furnished materials, if any. However, if the contract includes substation, transmission or nonstandard distribution facilities, the plans and specifications must be approved by the REA field engineer or Power Supply, Management and Engineering Standards Division for power supply borrowers.

b. For generating plant construction if the maximum contract price does not exceed $50,000.

c. For headquarters facilities construction if the maximum contract price does not exceed $25,000.

2. Where negotiation is permitted under this Bulletin, borrowers may use the same REA standard construction contract forms as they use for competitively bid projects, or they may use REA Form 790, "Distribution Line Extension Construction Contract (Labor and Materials)" or REA Form 792, "Distribution Line Extension Construction Contract (Labor Only)," for the construction of distribution facilities priced on an assembly unit basis where the quantities

of the units are not specified. Where negotiation is permitted under this Bulletin and where borrowers determine that payment to the contractor on other than the basis of assembly unit prices is in their best interest, they may use contracts for distribution facility construction which provide for payments on other bases including equipment rental costs and hourly labor costs, for example. The pertinent provisions of the REA standard forms of contracts should be included in any such special contracts.

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3. The construction performed under the Distribution Line Extension Construction Contracts, REA Form 790, or REA Form 792 or nonstandard negotiated contracts is accounted for in a manner similar to the procedure outlined in REA Bulletin 184-2, "Suggested Work Order Procedure." A final inventory of each section completed under these contracts showing the number of each type of construction unit installed is required. The amounts paid to the contractor are charged to a separate construction work in progress account. The costs of construction from the final inventory of construction furnisher by the contractor and other costs applicable to the work performed under the contract may be included on REA Form 219, "Inventory of Work Orders," but should be clearly identified as representing construction under a specified contract.

C. *Construction Contract Amendment:*

1. During the construction period it may be necessary or desirable to amend construction contracts to provide for changes in construction or for additional construction not contemplated when the contract was executed. A contract amendment will generally be one of the following types:

   a. Amendments for minor changes or additions in work to be performed, addition of assemly units, changes in quantities of assembly units specified in the contract, or extention of time for completion of construction.

      Experience shows that normally some changes and modifications during the course of construction may be expected. However, careful design and complete detailed plans and specifications will minimize the number of this type of contract amendments.

   b. Amendments for additional construction or major changes which may involve a substantial change in the

scope or cost of the work specified in the contract. The borrower may decide to amend the contract in preference to taking new bids when it appears that such action is in its best interest.

2. Borrowers may execute amendments of the type set forth in paragraph a, above without prior REA approval. For proposed amendments as outlined in paragraph b, above, borrowers should furnish REA with complete facts in support of the proposed amendment including a board resolution prior to executing such an amendment.

3. Each time an amendment is executed, the borrower should make certain that:

a. The contractor's bond covers the additional work to be performed, as well as construction covered in the or-

iginal contract. If the amendment by itself or together with preceding amendments amounts to more than 20% of the maximum contract price, a bond extension will be required, bringing the penal sum of the bond to the total amended contract price. A form of bond extension, REA Form 801 is available from REA.

b. If the amendment covers construction in a county or state not included in the original contract, the borrower and contractor are qualified to do business in that location. For example, the borrower's mortgage, if not previously recorded, must be recorded in the county and the contractor may be required to obtain an additional state license.

4. Amendments requiring REA approval, properly completed and executed, are to be submitted in triplicate to REA for approval with a copy of the appropriate board resolution. An information copy of amendments not subject to REA approval should be sent to REA for its records.

D. *Subcontracts*: The standard forms of construction contracts prescribe the conditions under which a contractor may subcontract a portion of the work. Under some forms of construction contracts, a contractor may subcontract certain portions of the work without approval of the owner, surety and REA, while other forms of contracts require that such subcontracts be approved by the owner, surety and REA.

• • •

VIII. *Standard Forms of Contracts and Purchase Orders:*

Exhibit II enclosed lists the standard forms of contracts and purchase order for use in connection

with contract construction and purchase of materials and equipment. Information on the purpose and availability of the forms is also included.

/s/ David A. Hamil
Administrator

Enclosures

Exhibit I —Summary of Construction and Materials and Equipment Contract Requirements

Exhibit II—REA Standard Forms for Construction and Purchase of Materials and Equipment

Index:

EXHIBIT I

SUMMARY OF CONSTRUCTION AND MATERIALS AND EQUIPMENT CONTRACT REQUIREMENTS

TYPE OF FACILITY	PURCHASE OF MATERIALS & EQUIPMENT		CONSTRUCTION
	Std. Contract Forms	REA Approval of Contracts	Std. Contract Forms
Distribution (including substations)	Material Contract REA Form 173 Purchase Order REA Form 551	Not required	Elec. System-IAM REA Form 830 Line Extension-IAM REA Form 790 Line Extension-L.O. REA Form 792
Transmission (including substations)	Materials Contract REA Form 173 Purchase Order REA Form 551	Not required	Transmission-IAM REA Form 831 (includes drawings & specifications) (For combined distribution and transmission projects) Elec. System-IAM REA Form 830
Substations (not included above)	Materials Contract REA Form 173 Purchase Order REA Form 551	Not required	Substation Erection-REA REA Form 764
Generation	Under $50,000-Materials Contract REA Form 173 Purchase Order REA Form 551 $50,000 or more-Materials Contract REA Form 458 Equipment Contract REA Form 198	Under $50,000-Not required. $50,000 or more-REA Area Office for distribution borrowers & Power Supply, Mgt. & Engrg. Stds. Div. for power supply borrowers, Plans and specs., also subject to REA approval.	Generating Plant-REA Form 200
MQ & related buildings	—	—	Building-REA Form 257

(Columns continued on next page)

SUMMARY OF CONSTRUCTION AND MATERIALS AND EQUIPMENT CONTRACT REQUIREMENTS

CONSTRUCTION

Std. Drawings & Specs.	REA Approval of Plans and Specs.	REA Approval of Contracts
7.2/12.5 kv-REA Form 804. 14.4/24.9 kv REA Form 803. Underground-REA Form 806. Substations-prepared by borrower's engineer.	Not reqd. for std. construction, REA Field Engineer for nonstd. construction or if substations are included.	Not required
Transmission Lines-REA Form 831 (includes contract) REA Form 805 Substations-prepared by borrower's engineer.	REA Field Engineer for distribution borrowers, REA Power Supply, Mgt. & Engrg. Stds. Div. for power supply borrowers.	REA Area Office for distribution borrowers, REA Power Supply, Mgt. & Engrg. Stds. Div. for power supply borrowers (Not required for REA Form 830)
Prepared by borrower's engineer.	REA Field Engineer for distribution borrowers, REA Power Supply, Mgt. & Engrg. Stds. Div. for power supply borrowers.	REA Area Office for distribution borrowers, REA Power Supply, Mgt. & Engrg. Stds. Div. for power supply borrowers.
Prepared by borrower's engineer.	Not required if under $50,000, $50,000 or more-REA Area Office for distribution borrowers or Power Supply, Mgt. & Engrg. Stds. Div. for power supply borrowers.	REA Area Offices for distribution borrowers, REA Power Supply, Mgt. & Engrg. Stds. Div. for power supply borrowers.
Prepared by borrower's architect.	Not required if under $25,000, REA Area Office $25,000 or more.	Not required if $100,000 or less. Modify REA Form 257 per instructions with form. REA Area Office if over $100,000.

EXHIBIT II
REA STANDARD FORMS FOR CONSTRUCTION AND PURCHASE OF MATERIALS AND EQUIPMENT

FORM	TITLE	PURPOSE	SOURCE OF COPIES
(3-55)	Materials Contract	Distribution, transmission, general plant and minor generation material and equipment purchases. The "Notice and Instructions to Bidder" is detached when formal bids are not requested.	Owner or Engineer furnishes (sample copies available from REA)
(8-66)	Construction Contract Amendment	Amending the Electric System Construction Contract, REA Form 830; the Electric Transmission Construction Contract, REA Form 831; the Substation Erection Contract, REA Form 764; or the Agreement for Right-of-Way Clearing, REA Form 201.	REA
(3-57)	Equipment Contract	Generating plant equipment purchases requiring acceptance tests on the project site.	REA
(4-59)	Generating Plant Construction Contract	Generating plant construction or for the furnishing and installation of major items of equipment.	REA
(7-56)	Right-of-Way Clearing Agreement	Right-of-way clearing work which is to be performed separate from line construction.	REA

FORM	TITLE	PURPOSE	SOURCE OF COPIES
(8-56)	Special Drawings for 7.2/12.5 kv Line Construction	Special drawings rarely used printed on translucent paper which may be reproduced if required.	Owner or Engineer reproduces from single copies available from REA
(10-66)	Construction or Equipment Contract Amendment	Amending the Generating Plant Construction Contract, REA Form 200; the Building Construction Contract, REA Form 257; the Equipment Contract, REA Form 198; or the Materials Contract, REA Form 458.	REA
(3-68)	Building Construction Contract	Headquarters buildings, generating plant buildings, and other structure construction.	Supt. of Documents, GPO, Wash,. D.C., 20402 $0.25 per copy
(7-70)	Equal Opportunity Addendum	Addendum to Construction, Material and Equipment Contracts not having current equal opportunity provisions.	REA

(SEAL)

United States Department of Agriculture
Rural Electrification Administration
Washington D.C. 20250

February 17, 1981

SUBJECT: REA Bidding Procedures

TO: Generation and Transmission Borrowers

In recent months, several instances have come to our attention which demonstrates that some confusion exists regarding REA established bidding procedures. I hope, by this letter, to clarify REA's procedures as they relate to acceptable bidding practices.

The three bidding procedures provided for in REA Bulletin 40-6, "Construction Methods and the Purchase of Materials and Equipment," are described as follows:

1. *Formal competitive bidding:* All "Notices and Instructions to Bidders" in standard REA contract forms are set up for formal bidding, with sealed proposals to be submitted by the bidder, and a public bid opening held. Under this bid procedure, any proposal with a major exception must be rejected immediately without reading the bid prices. It is, therefore, essential that your attorney as well as your consultant engineer be present at the bid opening for the purpose of reviewing the proposals prior to the actual reading of the bid. Bulletin 40-6 provides examples of major exceptions and reasons for rejecting bids. This bidding procedure should be used for all transmission line and substation construction contracts. The use of "informal" or "negotiated"

bidding procedures requires prior REA approval; such approval is rarely given for construction of these types of facilities.

2. *Informal competitive bidding*: This procedure is described in supplement to Bulletin 40-6 dated May 23, 1973. Although the supplement addresses generation facilities only, the same procedure can be applied to the purchasing of equipment and materials for transmission facilities.

   Under this procedure, the "Notice to Bidders" is revised to reflect that bid proposals will be privately opened, and that a subsequent round of negotiations, where necessary and at the Owner's option, for clarification of proposals may be undertaken to arrive at a final contract bid price. The key points to note under this procedure are:

   a. The final bid proposal arrived at must be responsive to the bid documents, which means no major exceptions. Those proposals with major exceptions remaining after the *one* round of negotiations must be rejected. Bulletin 40-6 specifically states that the selected bid shall be the "low responsive bid conforming to the plans and specifications."

   b. Only *one* round of negotiations is allowed and must be strictly adhered to. (Reference Bulletin 40-6 on language to add to "Notice to Bidders").

   c. Bulletin 40-6 provides for a negotiating committee to certify to the results and a sample form of certification is enclosed for your use.

   d. The contract package submitted to REA for contracts subject to REA approval should include three copies of (1) a properly executed contract, (2) appropriate board resolutions, (3) negotiating committee certification, and (4) bid tabulation and engineer's evaluation of the proposals. In using contract Form 173, "Materials Contract," only one copy of each need be submitted, since the contract is not subject to formal REA approval. Informal bidding procedures have been successfully used for purchases of transformers, breakers, steel towers, wood poles, conductor and hardware. It is an acceptable procedure for purchasing most transmission materials. Alternate liability and escalation clauses may be used where deemed necessary to obtain responsive bids, and the clauses are identified in Bulletin 40-6.

3. *Negotiated bidding*: Under this procedure, the "Notice to Bidders" should clearly state that proposals will be *privately opened* and if needed, *as many* negotiating sessions as necessary will take place with the bidders until a final contract *acceptable* to the Owner as to terms and conditions, technical conformance, and price is arrived at.

The same contract package as for informally bid contracts would be submitted to REA with the exception of a negotiating committee's certification. This procedure requires prior *REA approval*. It is presently being used for purchasing load management control related systems and is recommended by this office as the means of procuring this type of equipment.

I strongly urge you, your staff, your attorney, and consultant engineers to review REA Bulletin 40-6 as it relates to the bidding procedures outlined above. REA is obligated to see that these procedures are followed. We must point out to you that REA has in past years rejected contracts where these procedures were not strictly followed.

G and T Borrowers
Page 3

It should be noted that, as stated in Bulletin 40-6, REA bidding procedures must be adhered to regardless of the cource of financing for the project and regardless of whether or not contracts are subject to administrative approval.

Should you have any questions either regarding the above or at any time when bids are received for materials or construction, please do not hesitate to call either myself or members of my staff at (202) 382-1440.

/s/ Alexander E. Sherman
Chief, Power Transmission Branch
Power Supply Division

Enclosure

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
WILLIAM M. CONOVER and
ANTHONY R. TANNER,
Defendants.

CASE NO.
83-70-Cr-T-08
Tampa, Florida
March 9, 1984
3:55 o'clock p.m.

EXCERPT OF TRIAL PROCEEDINGS
VERDICTS AND POLLING OF THE JURORS
BEFORE THE HONORABLE BEN KRENTZMAN
AND A JURY

[Appearances omitted in printing.]

INDEX

(p. 3) (Jury in at 3:55 p.m.)

THE COURT: Good afternoon, ladies and gentlemen. The Marshal reports that you report that you've reached verdicts.

Would you fold the verdict forms and the Clerk will come and get them and she will hand them to me and I'll check to see that they're completed, if they are.

You may be seated, and thank you.

If they're completed, I'll ask the Clerk to publish them.

(Documents handed to the Court.)

THE COURT: The verdict forms are complete, they are signed by the foreman—forelady and they're dated, and I'll ask the Clerk to publish the verdicts.

THE CLERK: Please stand as the verdicts are being read.

The case of *United States of America versus William M. Conover,* Case Number 83-70-Cr.-T. "Verdict: We the jury unanimously find the defendant William M. Conover guilty of the offense as charged in Count I, guilty of the offense as charged in Count II, guilty of the offense as charged in Count III, guilty of the offense as charged in count IV, guilty of the offense as charged in Count V of the Indictment. So say we all, (p. 4) Eloise E. Trent, Foreman, dated at Tampa, Florida, this 9th day of March, 1984."

Case of *United States of America versus Anthony R. Tanner,* Case Number 83-70-Cr-T. "Verdict: We the jury unanimously find the defendant Anthony R. Tanner guilty of the offense as charged in Count I, guilty of the offense as charged in Count II, not guilty of the offense as charged in County (sic) III, guilty of the offense as charged in Count IV, guilty of the offense as charged in Count V of the Indictment. So say we all. Eloise E. Trent, Foreman, dated at Tampa, Florida, this 9th day of March, 1984."

Are these your verdicts?

THE JURY: (Nods heads affirmatively.)

THE COURT: Ladies and gentlemen, I'm going to ask the Clerk to poll you as to the verdicts. That means that she will ask you individually if these are your verdicts. Please do that.

THE CLERK: Mr. Kelly, are these your verdicts?

JUROR KELLY: Yes.

THE CLERK: Mrs. Asbel, are these your verdicts?

JUROR ASBEL: Yes.

THE CLERK: Mr. Abern, are these your verdicts?

JUROR AHERN: Yes.

(p. 5) THE CLERK: Mrs. Franklin, are these your verdicts?

JUROR FRANKLIN: Yes.

THE CLERK: Mrs. Snapp, are these your verdicts?

JUROR SNAPP: Yes.

THE CLERK: Mrs. Kronus, are these your verdicts?

JUROR KRONUS: Yes.

THE CLERK: Mrs. McKenzie, are these your verdicts?

JUROR McKENZIE: Yes.

THE CLERK: Mr.—Mrs. Gunther, are these your verdicts?

JUROR GUNTHER: Yes.

THE CLERK: Mr. Hardy, are these your verdicts?

JUROR HARDY: Yes, ma'am.

THE CLERK: Mrs. Williams, are these your verdicts?

JUROR WILLIAMS: Yes.

THE CLERK: Mrs. Fogarty, are these your verdicts?

JUROR FOGARTY: Yes.

THE CLERK: And, Mrs. Trent, are these your (p. 6) verdicts?

JUROR TRENT: Yes.

THE COURT: Does either party wish to poll the jury further as to the verdicts?

MR. BEST: No, sir.

THE COURT: Thank you, you may be seated.

* * * * * * * *

CERTIFICATE

I certify that the foregoing is a correct transcript from the record in the proceedings in the above-entitled matter.

/s/ Kathryn Bryant — May 23, 1984
Court Reporter — Date

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

V — CASE NO. 83-70-Cr-T-8

WILLIAM M. CONOVER and
ANTHONY R. TANNER

DEFENDANT TANNER'S
MOTION AND MEMORANDUM
FOR INTERVIEW OF JURORS
AND OTHER RELIEF

(Filed April 19, 1984)

Defendant ANTHONY R. TANNER, by and through his undersigned counsel, hereby moves the Court for entry of an Order authorizing the interview of certain trial jurors, the holding of an evidentiary hearing concerning such jurors, and such other relief, including the granting of a new trial or the dismissal of the indictment, as the Court may deem appropriate upon the taking of the necessary evidence. In support of this Motion, the undersigned states:

1. The jury entered verdicts of guilty on the majority of Counts at issue in the indictment and this cause is currently scheduled for sentencing as to both defendants on Friday, April 20, 1984.

2. On or about Wednesday, April 18, 1984 lead trial counsel for ANTHONY R. TANNER, David Best, Esq., received an unsolicited and totally unexpected telephone call from one of the trial jurors, Mrs. Asbul. Mrs. Asbul informed Mr. Best, as is more particularly outlined in the

attached Affidavit, that several of the male jurors, at various times throughout the trial, consumed alcohol during their lunch breaks and were frequently under the influence of alcohol during the trial proceedings. Mrs. Asbul also revealed, in substance, that these jurors were actually intoxicated on a number of occasions during the trial and that they also consumed alcohol on breaks during the jury deliberations leading to the return of the guilty verdicts. Mrs. Asbul also alleged that these same jurors had browbeaten her into rendering a verdict of guilty against the defendants, and had thereafter coerced the entry of guilty verdicts.

3. It is well established that where a juror, during the course of his duties, has become intoxicated or otherwise has misused alcoholic beverages or controlled substances to the extent that he has been adversely affected in the performance of his duties, the jury's verdict must be set aside and a new trial or other relief must be ordered. See, e.g., *United States v Provenzano*, 620 F. 2d 985, 996-998 (3rd Cir. 1980); *United States v Taliaferro*, 558 F. 2d 724, 726 (4th Cir. 1977); *Faith v Neely*, 41 FRD. 361, 366 (N.D. W.Va. 1966). See, also *Jorgensen v York Ice Machinery Corporation*, 160 F. 2d 434 (2nd Cir. 1947); *Lee v United States*, 454 A. 2d 770, 773-775 (D.C. Ct. App. 1982). If what Mrs. Asbul has related to Mr. Best is correct, it is clear that one or more jurors, at various times during the trial—even during the crucial stage of jury deliberations—misused alcoholic beverages. It is likewise clear that this course of conduct adversely affected the deliberations of the individual jurors and, in addition, interfered with the decision-making process of the jury panel. Indeed, it

would appear from what Mrs. Asbul has stated that the jury foreman's apparent misuse of alcoholic beverages led to the compulsion of guilty verdicts against the defendants. Under these circumstances, a new trial, at the very minimum, would be the only appropriate relief.

4. Rule 2.04(c), Local Rules of the Middle District of Florida, provides, in substance, that where grounds for a legal challenge of a verdict exists, the party may move for an Order permitting an interview of a juror or jurors to determine whether the verdict is subject to attack. The Rule also contemplates the holding, where necessary, of an evidentiary hearing to inquire into the grounds for setting aside the verdict for juror misconduct. Under the present circumstances, this Court should permit inquiry of the jury panel and, in addition, hold an evidentiary hearing.

5. Although the Courts are admonished not to permit "fishing expeditions" after the return of a verdict, an evidentiary hearing is a constitutional right of the accused where reasonable grounds for investigation into the conduct of the jury members exists. See, e.g., *United States v Moon*, 718 F. 2d 1210-1234 (2nd Cir. 1984); *United States v Moten*, 582 F. 2d. 654, 666-667 (2nd Cir. 1978). And where there is a well-founded basis for believing that a juror or jurors were drunk or under the influence of alcoholic beverages during the trial proceedings or deliberations, there clearly are reasonable grounds for an investigation by evidentiary hearing. See, e.g., *Jorgensen v York Ice Machinery Corporation*, 160 F. 2d 432, 435 (2nd Cir. 1947). Plainly, the unsolicited statement of a trial juror that such abusive practices occurred constitutes the necessary factual basis for judicial inquiry. This is not a

case where a party has merely speculated that juror misbehavior occurred; rather, the allegations of misconduct come from a member of the very panel charged with the deciding the guilt or innocence of the defendants. If a juror or jurors were intoxicated during the trial and subsequent deliberations, this Court would have no alternative but to grant relief from the verdicts. Unless an evidentiary hearing is conducted, and the parties are afforded the opportunity to interview jurors, it will be impossible to resolve the accuracy of Mrs. Asbul's representations.

6. What is more, Mrs. Asbul's representations of jury misuse of alcohol, raise a strong presumption of impropriety which must not be overlooked by the Court. The use of alcohol involves an improper outside influence into the jury's deliberative process; and where outside influences have been interjected into a case, a presumption of prejudice arises as a matter of law. See, e.g., *United States v Chiantese,* 582 F. 2d 974, 979 (5th Cir. 1978). Under this circumstance, it is incumbent upon the Government to rebut that presumption in the context of a full and fair evidentiary hearing. *Id.* at 582 F. 2d 979. As Justice Holmes has observed, "The theory of our system is that the conclusion to be reached in a case will be induced only by evidence and argument in open Court, and not by any outside influence . . ." *Patterson v Colorado,* 205 U.S. 454, 462 (1907). Misuse of alcoholic beverages to the extent that one or more jurors is drunk or otherwise affected, clearly creates an outside influence of an inimical character. Indeed, where one or more of the jurors in a trial, and during the deliberative process leading to a verdict, is under the influence of alcohol, the very purpose of the jury

trial is defeated; it is simply impossible to secure a full and fair analysis of the evidence by an impartial and attentive jury.

7. It is accordingly submitted that an evidentiary hearing to inquire further into Mrs. Asbul's allegations is required and that this hearing, together with any appropriate interviews or inquiries of jurors, must take place prior to the sentencing in this case. At the minimum, this Court must conduct an examination of Mrs. Asbul. After probing Mrs. Asbul's recollection, further inquiry of other jurors may also be necessary.

8. This Motion is filed only for the purpose of safeguarding the constitutional rights of the defendants, and for no other purpose. The Motion is submitted at this late date only because Mrs. Asbul's charges were not revealed to defense counsel until Wednesday, April 18, 1984.

WHEREFORE, Defendant ANTHONY R. TANNER hereby prays for an entry of an Order granting the following relief:

A. The scheduling of an evidentiary hearing to inquire into Mrs. Asbul's allegations of juror misconduct;

B. The entry of an Order regulating interviews of other trial jurors and setting the time, place, circumstances and conditions for such interviews;

C. Postponement of the sentencing scheduled for April 20, 1984 pending resolution of this Motion and the allegations of Mrs. Asbul; and

D. The entry of an Order dismissing the Indictment or, alternatively, granting a new trial because of prejudicial misconduct by one or more trial jurors.

DATED this 19th day of April, 1984.

Respectfully submitted,

/s/ Stephen D. Milbrath
DRAGE, deBEAUBIEN,
MILBRATH & SIMMONS
Co-counsel for Anthony R. Tanner
116 South Orange Avenue
Post Office Box 87
Orlando, Florida 32802
(305) 422-2454

[Certificate of Service omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 83-70 Cr-T-8

WILLIAM M CONOVER and
ANTHONY R. TANNER,

Defendant.

ORDER

(Filed April 23, 1984)

Sentencings of defendants herein was scheduled for April 20, 1984.

At about 1:57 p.m. on April 19, each defendant filed a motion to continue the sentencing date. Defendant Tanner filed a motion alleging certain improprieties on the part of members of the trial jury, requesting permission to interview certain of the jurors and requesting an order dismissing the indictment or alternatively, granting a new trial. Attached to said motion is the affidavit of David R. Best, Esquire. Defendant Conover, through counsel, filed a motion of adoption of defendant Tanner's motions.

At the time said motions were brought to my attention I was trying a jury case. I directed that all concerned be telephonically notified that the motions to continue would be granted and that I would enter a written order on April 20, 1984.

As indicated, the motion to continue was and is GRANTED. I find good cause to continue the date for

sentencing. New sentencing dates will be noticed if and when appropriate.

Rule 606(b) Federal Rules of Evidence in pertinent part reads as follows:

> (b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Rue 2.03(c) Local Rules of the Middle District of Florida, page 742 West's Desk Copy Florida Rules of Court State and Federal (1984) in pertinent part is as follows:

> (c) The professional conduct of all members of the bar of this Court, admitted generally under Rule 2.01 or specially under Rule 2.02 shall be governed by the Code of Professional Responsibility of the American Bar Association as modified and adopted by the Supreme Court of Florida to govern the professional behavior of the members of The Florida Bar (including, without limitation, the Florida modification of EC 7-29 and DR 7-108 (D) imposing restrictions upon the right of counsel to interview jurors after trial).

> If a party believes that grounds for legal challenge to a verdict exists, he may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to the challenge. The motion shall be served within ten (10) days after rendition of the verdict unless good cause is shown for the failure to make the motion within that time. The motion shall state the name and address of each juror to be interviewed and the grounds for the challenge that the moving party believes may exist. The presiding judge may conduct such hearings, if any, as necessary, and shall enter an order denying the motion or permitting the interview. If the interview is permitted, the Court may prescribe the place, manner, conditions, and scope of the interview.

Disciplinary Rule 7-108(D) Code of Professional Responsibility adopted by the Supreme Court of Florida, and effective October 1, 1970 (235 So.2d 723), and adopted by reference by the Judges of the Middle District of Florida, *supra*, reported in Volume 35, West's Florida Statutes Annotated, page 353 is as follows:

> (D) After dismissal of the jury in a case with which he is connected, a lawyer shall not communicate with or cause another to communicate with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge, in which event he shall scrupulously follow the procedure described and provided for in EC 7-29 hereof.

Ethical Consideration 7-29 of said Code of Professional Responsibility reads as follows:

> EC 7-29. To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to

trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a veniremen or a juror about the case.

- - - -

Subject to any limitations imposed by law it is a lawyer's right, after the jury has been discharged, to interview the jurors solely to determine whether their verdict is subject to any legal challenge provided he has reason to believe that ground for such challenge may exist, and further provided that prior to any such interview made by him or under his direction, he shall file in the cause, and deliver a copy to the trial judge and opposing counsel, a notice of intention to interview such juror or jurors setting forth in such notice the name of each such juror. The scope of the interview should be restricted and caution should be used to avoid embarrassment to any juror and to avoid influencing his action in any subsequent jury service.

Ethical Considerations 7-30 through 7-32 inclusive of said Code of Professional Responsibility are as follows:

EC 7-30. Vexations or harassing investigations of veniremen or jurors seriously impair the effectiveness of the jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

EC 7-31. Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

EC 7-32. Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a

juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

Whether or not counsel should be allowed to interview any or all of the trial jurors, and if so, the scope of the interview and issues to be explored are all matters that should be determined in advance of any such interviews.

The parties are directed to file memoranda directed to such issues on or before May 25, 1984. A hearing on motions for leave to interview jurors will be conducted beginning at 10 a.m. on May 30, 1984. In the interim ruling on defendants' motions for leave to interview members of the jury, to dismiss the indictment or grant a new trial is DEFERRED.

In the interim and until further order of Court no party hereto or lawyer or anyone on behalf of the parties or the lawyers shall communicate with or cause another to communicate to any juror about this case.

The motion on behalf of defendant Tanner for leave to interview and the affidavit attached thereto, filed April 19, 1984, shall be withdrawn from the Court file and filed by the Clerk as an *in camera* document subject to a ruling as to its admissibility or relevance on the issues presented.

IT IS SO ORDERED at Tampa, Florida this 23 day of April, 1984.

/s/ Ben Krentzman
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-70-Cr-T-08

Tampa, Florida May 30, 1984 10:00 o'clock a.m.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM M. CONOVER and
ANTHONY R. TANNER,

Defendants.

VOLUME NINETEEN
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE BEN KRENTZMAN
AND A JURY

[Appearances omitted in printing.]

(p. 19-2) THE COURT: Good morning. This is Number 83-70-Cr-T, a hearing on a motion filed by defendants. This hearing is being conducted in the courtroom. By virtue of the nature of the hearing, I have closed the courtroom. Now, I have instructed the Marshals to allow, of course, the defendants and their attorneys and members of their family come in and I note that at least some members of the family of one of the defendants is present.

I don't want to close the courtroom to anyone that the defendants want in here. Anyone outside that you wanted to get in that didn't get in?

MR. BEST: No, sir, your Honor.

THE COURT: All right. Fine.

A Miss Melone, M-e-l-o-n-e, who's a reporter for the St. Pete Times is outside. She is a lady who wrote one of the newspaper articles. She has requested a hearing be-

fore I closed the courtroom; which, in some instances, has been directed. I just told my Law Clerk to tell her I'm not having any hearing and I'm not talking with her about this; the courtroom is closed.

Now, I recognize that this hearing is important to the parties and that I've set aside the morning for the purpose of it. I want you attorneys to be at ease and feel that you have the right to present what you have within the area of professionalism here today.

(p. 19-3) Now I want to make just a brief statement and then I'll hear from you.

The verdicts were returned in this case on March 9, 1984, and I'm now reading just short excerpts from my Order of April 23rd:

Defendant Tanner filed a motion alleging certain improprieties upon the part of the members of the trial jury, requesting permission to interview certain of the jurors, requesting an Order to dismiss the indictment, or in the alternative granting a new trial.

I entered an order—first I granted the motion to continue the sentencing and the parties were— the attorneys were telephonically notified to that effect. And on April the 23rd I entered an Order which, among other things, said, "Whether or not counsel should be allowed to interview any or all of the trial jurors, and if so, the scope of the interview and the issues to be explored are all matters that should be determined in advance of any such interview." And I directed the parties to file a memorandum directed to such issues on or before May 25, 1984 and scheduled this hearing on the motion for 10:00 a.m., today, May 30, 1984.

Now that then is the scope of this hearing. I have received and have appreciated and have considered (p. 19-4)

and have considered the respective filings. Mr. Best filed an initial motion on behalf of defendant Tanner, supplemented by his affidavit.

Mr. Lazzara on behalf of Mr. Conover filed a motion adopting the motion filed by Mr. Best. Thereafter Mr. Lazzara filed a memorandum—a memorandum was filed on behalf of Mr. Tanner by Mr. Milbrath, and a memorandum was filed by the Government.

The memorandum filed by Mr. Milbrath has attached a photostat of a—what appears to be a newspaper article published April 24, 1984 written by a Jim Tunstall, T-u-n-s-t-a-l-l, allegedly a staff writer of the Tampa Tribune.

Now those are the matters which are in the file.

I want to, of course, grant to counsel the right to be heard on the matters set out in the hearing—in the Order which sets the scope of the hearing. And if you disagree as to the scope and want to be heard about other things, I'll hear you on that. But I think we're all agreed the memorandum would suggest that you accept those as being the central issue before me for a decision at this time.

Now I'll hear from either or both defendants in such order as you wish to present.

(p. 19-5) MR. LAZZARA: I'll go first, your Honor.

THE COURT: Yes.

MR. LAZZARA: Use the podium?

THE COURT: Yes, if you're comfortable there.

Excuse me. I note that Mr. Conover is not here.

MR. LAZZARA: Judge, he—

THE COURT: He elected not to be hear?

MR. LAZZARA: Yes, sir. He elected not to be here.

THE COURT: Well he's not required to be here. All right.

MR. LAZZARA: I believe the Court issue here is whether the defendants should be afforded an opportunity to demonstrate that as a result of alleged juror misconduct they were deprived of their Fifth Amendment right to due process of law and their Sixth Amendment right to a fair trial by an impartial jury.

We go on to say that the corner stone of our criminal justice system is the right of a citizen to be tried by a jury capable and competent and willing to decide the case only on the evidence before it, and that the ultimate conclusion reached by the jury would be untainted by any outside influence.

Now crucial to that Court issue in this case is (p. 19-6) whether your Honor will allow these defendants to interview the trial jury to determine if the use of alcoholic beverages had a debilitating effect on one or more of its members to perform their sworn duties as jurors.

I would submit to your Honor that the Court must allow such an inquiry to take place under the close scrutiny and supervision and guidance of this Court.

The affidavit filed by Mr. Best, I believe, details a conversation he had with Mrs. Asbel, one of the trial jurors. And in that regard, I would submit it's more than sufficient to demonstrate that some jurors were drinking alcoholic beverages over the lunch hour during days when court was in session and that this had an effect on their ability to be attentive and to concentrate on the trial procedures, specifically the evidence and testimony presented for their consideration. And as your Honor knows, having presided over this trial on two separate occasions, the testimony and evidence was rather complicated in nature.

Now Mr. Conover takes two positions. First, your Honor, we contend that there are ample facts set forth in this affidavit to show that an outside influence, that is alcoholic beverages, was brought to bear on this trial jury, and that under the law of *United States vs. Chintese*, C-h-i-n-t-e-s-e, which is cited in our (p. 19-7) memorandum of law, a presumption of prejudice arises in favor of the defendants to the affect that the verdict was improperly influenced and the burden of proof is on the Government to demonstrate otherwise.

Now although I recognize that outside influences have been generally, under our case law, taken the form of unauthorized communications between jurors and third parties, I submit to the Court that alcoholic beverages should also be construed as an outside influence.

I would submit that it's just as inimical to have the preceptive and cognizant functions of a juror, though impaired by the use of intoxicants, as it is to threaten and bribe or otherwise attempt to influence a juror through written or oral form.

Now should your Honor, after considering the matter, conclude that alcoholic beverages do not constitute an outside influence, I submit that the Court still must allow us an opportunity to interview this juror. Under *United States vs. Provenzano* and *United States vs. Taliaferro*, which I've cited in my memo, those cases, I believe, stand for the proposition that the burden is on the defendants to show prejudice by the use of intoxicants.

But, I submit, how can we meet the burden of proof without the opportunity to ascertain the true facts (p. 19-8) from the jurors themselves. And again I submit that Mr Best has laid a sufficient evidentiary predicate to authorize

a more extensive interview of these jurors to get to the heart of the matter.

Did the use of alcoholic beverages impair the function of this jury so that they were not able to fully, fairly and competently and impartially discharge their fact-finding and deliberate functions as they swore to do when they were sworn prior to the commencement of this trial?

I submit to you that it would only be through these interviews that this Court will be in a position to apply the test promulgated by *United States vs. Kley* (phonetic), and *United States vs. Yonn*, which are also cited in my memorandum, that is, whether or not the alleged juror misconduct prejudiced these defendants to the extent that they did not receive a fair trial which is their Constitutional right under the Fifth and Sixth Amendment.

Now Mr. Conover would submit that Federal Rule of Evidence 606 (b) does not preclude the relieve sought herein. We're not asking these jurors to impeach their verdict. All we are seeking is to determine whether an outside influence was improperly brought to bear on their number.

(p. 19-9) And additionally I would submit that in that context it would seem to me that the Fifth and the Sixth Amendments are the polestars here which should control this issue and govern this issue.

Now should the Court grant the relief requested, I have set forth Mr. Conover's position in accordance with the Court's order as to how the interview should be conducted and the scope of those interviews so I won't really address that issue.

Judge, that's basically our position. It's a unique situation, but I believe that under the affidavit filed by Mr. Best which contains information which was given to

him unsolicited and based on the law that's cited, I think that we are entitled to interview these jurors to ascertain what affect intoxicants had on their fact-finding and deliberate functions and also to have a full evidentiary hearing going to the heart of the issue of are we entitled to a new trial.

Unless the Court has any questions of me, that concludes my presentation and I thank your Honor.

THE COURT: No, I think your presentation tracks very well with your memorandum and I appreciate both.

MR. LAZZARA: Thank you, your Honor.

MR. MILBRATH: Your Honor, if I may speak on (p. 19-10) behalf of Mr. Tanner.

I know the Court's read my memorandum and I won't reiterate everything I said there. But I think that the threshold issue, as Mr. Lazzara has pointed out, is whether an evidentiary hearing of some kind is required.

We believe that the case law clearly supports the proposition that more than an interview is required; really for at least two reasons.

The first, given Mrs. Asbel's allegation, which include not only the use of alcohol but statements and conduct on the part of the alleged defending jurors to the affect that they didn't care what was going on in the trial.

These taken in the context of all the other facts indicate that these jurors may have entertained a bias or a prejudice against the defendants throughout the trial and during the deliberative process itself.

And under *Smith vs. Phillips*, in the decision of the Supreme Court, there can be no doubt—

THE COURT: Well, what is that? Tell me what that case was about, what the facts were.

MR. MILBRATH: That's 455 U.S. 209, a 1980 case. That case involved a man that was a juror who, during the trial, was applying for a job as a Federal (p. 19-11) investigator and didn't let anyone know that. The prosecutors knew it and didn't make the Court aware of it. There was no evidence that that juror, because he was applying for a Federal investigator's job, necessarily engaged in any misconduct with respect to the defendants but the Supreme Court said—

THE COURT: Was that a motion for a new trial or something?

MR. MILBRATH: Oh, yes. The defendants were convicted—

THE COURT: And did they reverse?

MR. MILBRATH: No. The issue there was was it prejudice as a matter of law. Just the mere fact that that juror applied for a job, was that in and of itself presumptive prejudice so conclusively that a new trial had to be granted.

THE COURT: What did they say?

MR. MILBRATH: They said no, an evidentiary hearing fully satisfied the requirements of the Constitution. But clearly they contemplated an evidentiary hearing at which all parties—

THE COURT: Did they have a hearing in that case?

MR. MILBRATH: Oh, yes, sir.

THE COURT: And at the hearing what happened?

(p. 19-12) MR. MILBRATH: At that hearing the District Judge determined that that particular juror was not biased against the defendants.

THE COURT: Well did that have anything at all to do with happenings inside the jury room?

MR. MILBRATH: No.

THE COURT: Ail right. Go ahead.

MR. MILBRATH: This was completely extraneous activity on the part of the juror.

THE COURT: Thank you.

MR. MILBRATH: But I cite that case as authority for the proposition that there's sufficient reason to believe from Mrs. Asbel's allegations that these jurors who were using alcohol were biased against the defendants. an evidentiary hearing is required for that reason alone regardless of the use or misuse of alcohol.

Secondly, I think if you read the Provenzano and Taliaferro case and also Judge Leonard Hand's decision in *Jorganson vs. York Ice Machinery*, and I've cited all those cases in my memorandum—

THE COURT: Yeah, I did read those cases.

MR. MILBRATH: I think they all clearly either require or contemplate or hail, in the Court below, an evidentiary hearing.

(p. 19-13) THE COURT: Well did any of those cases relate to an alleged misconduct in the jury room?

MR. MILBRATH: Taliaferro did, to the extent that the allegation was—

THE COURT: There was a motion for new trial, wasn't there?

MR. MILBRATH: Yes. And I believe the allegation was during the deliberations the jurors had drinks at lunch on a break.

THE COURT: And what did they say about that?

MR. MILBRATH: They said one drink at lunch isn't going to kill the case. But clearly there was an evidentiary hearing to determine whether or not the jurors had been intoxicated.

THE COURT: Does it say that?

MR. MILBRATH: Well if you read it, it's on Page 726, 558 F.2nd, it says, "The defendant must show he was prejudiced, i.e. the jurors became intoxicated so that he or she was affected in the performance of his or her duties."

The finding below was there was no affect.

THE COURT: So did they have an evidentiary hearing?

MR. MILBRATH: My understanding was that they did. the way I read that case.

(p. 19-14) THE COURT: All right. Thank you. What's the date of that?

MR. MILBRATH: May 6th and decided July 26, 1977.

THE COURT: Thank you.

MR. MILBRATH: Now I believe if you read *United States vs. Moton*, 582 F.2nd 654 out of the Second Circuit, there they again discuss this whole area of extra-evidentiary conduct by a jury and suggest a need for evidentiary hearing. And if you read—

THE COURT: Now you say "if you read". If it's in your memorandum I either have read it—

MR. MILBRATH: Yes, sir. It's cited.

THE COURT: The purpose of this hearing is for you to educate the Court. If you've got it there, you tell me what the opinion is. Don't say, "If you read." I want to know what—you ought to be able to tell me what the holding was, what the essential facts was and how it's relevant to this case.

MR. MILBRATH: I suggest to you that *Morgan vs. United States*, which was decided by the Fifth Circuit, was directly on point, that did not involve an allegation of misuse of alcohol, as I recall it involved some claims that the jurors had read newspaper articles during the deliberations. The Court specifically (p. 19-15) required a full hearing in the presence of counsel and suggested defense counsel had a right to cross examine.

THE COURT: What was the date of that case?

MR. MILBRATH: That was 1968.

THE COURT: 1968?

MR. MILBRATH: Yes, sir. By the Fifth Circuit.

THE COURT: I asked that because possibly the fact that the Rules of Evidence adopted in 1975 would have some affect.

MR. MILBRATH: Well then I suggest that Weinstein's evidence, which I believe is authoritative in the Fifth Circuit and it's been cited in the Eleventh Circuit opinions, is relevant on that issue.

And Weinstein's evidence, your Honor, at the section that discussed Rule 606 addresses the impact of that rule on cases such as the ones that I've cited.

You'll recall that—

THE COURT: You cite that in your memorandum?

MR. MILBRATH: Yes, I do.

THE COURT: What does it say?

MR. MILBRATH: In *Fafe vs. Neilly*, which was a West Virginia Northern District case cited in my memorandum and Judge Hand's opinion—I cited both of those cases for the proposition that an evidentiary hearing was required. Both cases, as I understand it, (p. 19-16) had evidentiary hearings, and those cases are discussed in footnote 21 in Weinstein's evidence in which he says at Page 606-31: "Rule 606(b) would not render a witness incompetent to testify"—

THE COURT: A witness or a juror?

MR MILBRATH: A witness. "Incompetent to testify"—well let me read the whole paragraph.

"Because of the general provision of Rule 601 that all witnesses are competent except as otherwise provided, evi-

dence of the jury conduct is admissible and a juror—a juror may testify to it except as prohibited by Subdivision B of Rule 606. Rule 606(b) would not render a witness incompetent to testify to juror irregularities such as intoxication."

And it cites *Fafe vs. Neilly* and *Jorgansen vs. York Ice Machinery*.

And it goes on to cite, "Other examples in the same category, such as exposure to threat, acceptions of bribes or possession of knowledge relevant to the facts in issue obtained not through the introduction of evidence but acquired prior to trial or during trial through unauthorized use of experiments, investigations, news media, books or documents or through consultation with parties, witnesses or others."

Now there Weinstein consolidates all the cases (p. 19-17) involving so-called objective misconduct by a jury, whether it's reading a newspaper, being drunk on the job or going out and viewing the scene of a crime without telling anyone. All that conduct is lumped together as extra jury influence of which a juror may testify about under Rule 606(b), and concerning which an evidentiary hearing should be required.

Now he goes on to state that the Rule would "Prohibit inquiry into the affect such irregularities had on the minds of the jurors. The Judge must assess the misconduct and decide whether it would probably have had a prejudicial effect."

And then he states, "Such misconduct carries with it such a strong presumption of prejudice that the burden

is on the successful party to show that the verdict was not tainted by the jury's improper actions."

And he cites *Rimmer vs. United States*, which is one of the principal cases cited in my Brief and which clearly is the principal Supreme Court case on presumption of prejudice where that kind of objective, outside influence, is involved.

And I think that Weinstein's analysis is the correct one. I suggest to you that irregularities such as intoxication raised a presumption of prejudice that Rule 606(b) does not foreclose testimony by a juror (p. 19-18) about that subject; although the Judge has to set reasonable constraints on the juror's testimony.

It would not be pertinent according to Weinstein, and I agree with this, to ask the juror what impact did the use of the alcohol have during the deliberation process on your own mental process. Because Rule 606(b) is designed to prohibit inquiry into how someone's mental process was affected by some alleged conduct.

And that's where you get into the subjective area that I think the Rule 606(b) was intended to deal with. It wasn't designed to foreclose testimony about that kind of outside influence. It was designed to foreclose second-guessing and retrospective analysis of how one would have decided a verdict but for the use of alcohol or but for being coersed by one of the fellow jurors.

THE COURT: You suggest you can ask about that coersion?

MR. MILBRATH: No. I'm saying I don't think that's appropriate. I don't think the fact that juror "A"

coerced juror "B" is an inquiry in this case. But I think if the evidentiary hearing establishes—

THE COURT: Well let's see what the allegations of the affidavit are.

(p. 19-19) MR. MILBRATH: Yes, sir.

THE COURT: And I'll read the—Mr. Best's affidavit, Subparagraph 5-B. It says, "Juror Asbel states several of the male jurors drank alcoholic beverages during lunch on numerous occasions throughout the trial of this cause and then slept through the afternoon."

"She stated that some of the male jurors were drinking every day and didn't care about the trial," and so forth. And that—so much—I believe it was about the male jurors.

In your memorandum you referred to that.

Now it's not clear to me and I'm not sure that it's clear at all where the—it does seem rather clear that she's saying during the trial of the case. She has no—there's nothing in the affidavit that would say whether that continued during the deliberations of the verdict, the jury deliberations, or not. But I assume that wouldn't make that much difference.

While we're on that point, it seems to me that if we're not going to have an evidentiary hearing or if we are—we'll not have one now, we haven't had one so far—that whether you should consider the—606(b) of the Federal Rules of Evidence refers to affidavits and other things, that if it is to be applied strictly, it (p. 19-20) would preclude the consideration or admissibility of the—of certain portions of the affidavit.

But at any rate, arising out of all of this, you have attached a newspaper article. There was a newspaper article from the St. Pete Times, I have a copy of it. I assume some of you read that. It's by MaryJo Melone, M-e-l-o-n-e.

And what happened is that Mr. Best's affidavit and motion were filed in open court. For about a day they were there and that's where the two reporters saw that affidavit.

Later, in accordance with my Order, it was refiled as an in camera document.

She referred to that affidavit, Ms. Melone did, and she call—apparently she—according to her article she called Mrs. Asbel and she said, "But the woman Vera Asbel of Land O'Lakes told the St. Petersburg Times she never said the jurors were intoxicated only that she'd seen them drinking or heard them discussing it."

Now I don't accept any of this as evidence, it's hearsay just as that affidavit is. But the affidavit, I guess, would be—so I'm going to direct, just for the record, that a copy of this newspaper article, this whole section, be made a part of the (p. 19-21) record, just as the newspaper article you published.

MR. MILBRATH: I was under the impression that I had attached that one as well. If not, I was in error. I thought I included both of them as Exhibits A and B.

THE COURT: Well what do you mean by that?

MR. MILBRATH: To my memorandum.

THE COURT: Yeah. But do you mean they will be in evidence?

MR. MILBRATH: No, I just—

THE COURT: They'd be in the file any way.

MR. MILBRATH: Yes, sir.

THE COURT: All right.

MR. MILBRATH: I thought they were important.

THE COURT: Both of them—let's see. Oh, I see. I didn't know—well—oh, I just saw the last one.

So you actually included both of them, is that right?

MR. MILBRATH: Yes, sir, I did.

THE COURT: All right. Then they're there, whatever they were.

All right. What else?

MR. MILBRATH: I suggest to you that Weinstein's analysis is correct and I think it's consistent with the later Opinion in *Smith vs. Phillips* about the need (p. 19-22) for an evidentiary hearing to explore jury bias and other misconduct.

I think the Morgan case, the Fifth Circuit case cited—

THE COURT: Now the Smith case, is that a 1968 case?

MR. MILBRATH: Morgan was a '68 case. Smith was 1980 by the Supreme Court.

THE COURT: And it dealt with—

MR. MILBRATH: It dealt with jury bias. That was the fellow that applied for the job.

THE COURT: All right.

MR. MILBRATH: So there's unequivocal—

THE COURT: But the interplay of Rule 606(b) had nothing to do with that.

MR. MILBRATH: I don't think it was ever cited.

THE COURT: Well it just wasn't relevant. They didn't ask about that.

MR. MILBRATH: Well—

THE COURT: All right. Go ahead.

MR. MILBRATH: I suggest to you that Weinstein has a fair analysis of why it's not really relevant.

Also in the same discussion of Rule 606(b) at (p. 19-23) Page 606-29 he discusses *Parker vs. Gladden*, and he states, and I quote, "It is further complicated by the Supreme Court's decision in *Parker vs. Gladden* which suggests that in criminal cases at least, Constitutional rights may require inquiry into the circumstances regarding a jury's deliberation regardless of the jurisdiction and rule on impeachment by jurors."

THE COURT: All right. Thank you. Let me say this: I respect Judge Weinstein. He is a—I believe a Chief Judge now of the—I think the Eastern or the Southern District of New York. He was a member of the Judicial Conference Advisory Committee which considered these Federal Rules of Evidence.

He—his book which he co-authored, I think, with someone else was published almost simutaneously with the publication of the Rules. So it turned to be gratuitous work by him. I value his comments. I also value the comments of the full Advisory Committee as the notes are set out

following the printing of Rule 606 as it's contained in the Federal Rules of Evidence.

MR. MILBRATH: Yes, sir.

THE COURT: There we have an Advisory Committee's notes, the report of the House Judiciary Committee, the report of the Senate Judiciary Committee and then the conference report; all small print and (p. 19-24) runs two and a half pages, and I've read it all, it's all important.

And it shows, as is normal, that the Federal Rules of Evidence were a legislative effort in arriving at a law frequently compromised. And here the compromise—the House Judiciary Committee's position was slightly different from the Senate Judiciary Committee. The conference adopted the version of the Senate Judiciary Committee and resulted in the rule as it's printed.

The House Judiciary Committee opted for a version which would have allowed greater inquiry into matters within the jury room than the actual rule as finally adopted came out.

The House Judiciary Committee cites, and with approval, existing law as of that time—and they don't cite the case but they just say under the report of the House Judiciary Committee in the first paragraph, I guess it's the last sentence I'm reading, "Under this formulation, a quotion verdict could not be attacked to the testimony of the juror nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations."

So that at least is the thinking of the members of the House who adopted this Federal Rule of (p. 19-25) Evidence, if that means anything. And—all right.

MR. MILBRATH: Well I suggest to you that that is not the law and it's not even—the test of the rule itself says, "A juror may testify on the question of whether extraneous prejudicial information"—

THE COURT: Well the whole thing here is whether or not—I think one of the critical issues, and there's several—one is whether or not—and I don't want to try to get technical but I was about to say ingestation, but that's not correct—but whether drinking, swallowing alcoholic beverages—and I guess that's about the only way—I don't know of any other way to get—swallowing alcoholic beverages outside of the jury room and then the person who did that coming into the jury room, whether that results in an outside influence.

There's not very many jury rooms where they serve alcoholic beverages, I don't think. There may be some but certainly not in this court. So it would have to have been—the alcoholic beverage would have had to be swallowed outside the jury room and then brought into the jury room, I guess, in the stomach or wherever it happened to be in the digestive system of the person. Now whether that's an outside influence or not is in question.

(p. 19-26) I want to suggest just this: Even after the Eighteenth and the Twenty-first Amendment there's a good many people in this country who have differing ideas about drinking.

And I could tell a story about—you're familiar with the politician's view about which position he took.

But at any rate, suffice it to say—and I think this about that—some might say, well if you had—if we sequestered

every jury, carefully regulated what the jury ate and drank you could control what the jurors had with them during the trial in that regard. But that's not necessarily so. In juries which have been sequestered in this court for long periods of time, over months, orders have been entered—and I just didn't happen to be the Judge who did it, but orders have been entered authorizing the Marshals, as part of the money to be expended for the jurors, to allow those jurors who wish to do so to have not more than two cocktails during the evening.

Now that just shows some approach. And that is a model, by the way, adopted by other districts. I don't know whether I would authorize that or not, but—

MR. MILBRATH: That was during the evening.

THE COURT: —I don't know that I wouldn't.

(p. 19-27) But drinking, per say, in moderation certainly is not inherently prejudicial. If you say that a juror who has something to drink outside the jury room and brings it with him is an outside influence, you might also say that any juror who stayed up half the night watching T.V. or had a big argument with his wife the morning before he came to trial so he was upset for the first half-day wasn't thinking straight, or any juror who had a particularly bad cup of coffee that morning was irritable all day.

All of those could be the kind of things that would be outside influences and yet obviously you can't regulate. Jurors are human beings. The jury system relys upon human beings who are selected by—these parties have some input into it. And—

MR. MILBRATH: If I may, I would suggest to you that there is a distinction.

THE COURT: Well it's a matter of quality and degree. I agree that my examples are not—well I don't know if there's much distinction between not having a cup of coffee and being irritated or having one cocktail and being slightly sedated. I don't know which is the better and which is the worse.

If you had your psychiatrist—or psychologist with you who sat with you during the trial, she might be (p. 19-28) able to advise you about that; I doubt it.

These are all things that are getting off the point.

Go ahead and finish your argument.

MR. MILBRATH: Well my argument is that Mrs. Asbel's allegations are that these people didn't drink at night, they drank during the lunch break, and that some of them bragged about having liquid lunches and that some of them slept.

THE COURT: Well now let's talk about that. First I want to note, and you can confirm this, that this was an interesting jury in that you people helped select a jury of—well, there were fourteen initial jurors and they included—it doesn't work out.

At any rate, there were 10 ladies and I count 3 men, and then one of the men was excused, did not deliberate. I don't know what ever happened to the rest of them. But by far the majority of these people were ladies, and the foreperson or the foreman was a lady.

Now at one—so that Mrs. Asbel's suggestion of "several of the jurors," "several" being more than two, there were possibly at times—there were at sometime on this jury, including the alternate, there were three men. I don't

think there were ever four men. At (p. 19-29) the most there were three men on—no, one, two—four men. There were four men at one time and one of the men was excused and eventually the second alternate, a lady, was excused. So that the deliberating jury had three men and nine ladies.

Now I just mention that for the record. There's some suggestion about might be men versus the woman or something like that on the jury.

MR. MILBRATH: I think Mrs. Asbel's allegations are confirmed by the fact that we noted frequently during the trial, and I called it to your attention on one occasion specifically, that some of the jurors were nodding off, weren't paying attention, you could literally see her head lay over on her shoulder with her eyes closed.

THE COURT: Well now, I want to refer to your memorandum. And I'm reading from Page 2. You say, "It will be recalled that during the trial of this case the undersigned counsel"—that's you, Mr. Milbrath—"on behalf of Mr. Tanner complained to the Court that certain of the jurors, particularly one of the female jurors," you say, "had been sleeping throughout the trial and appeared to have an inability to stay awake."

You say, "The Court declined to take any action at that time and chastised the undersigned counsel (p. 19-30) for raising this issue.

"Mrs. Asbel's allegations now confirm the apparent reason," you say, "for the inability of some of the jurors to stay awake or appear to be attentive." You say, "That was abuse of alcohol."

Now I asked the Court Reporter—the lady here today is the Reporter who reported this trial—indirectly, I didn't

talk to her directly, but I asked her to transcribe or prepare a transcript of not—well of the only one I knew of, and I didn't tell her when it was, I just said the transcript of the bench conference when it was mentioned, and she's done that.

I'm going to file it to go forward with the record in this case. And it—I don't think—contains anything that would be deemed to be a chastisement of you, counsel, unless you count my looking at you sternly, which you seem to have been upset about on occasions; but I wasn't conscious of that.

But at any rate, it does confirm what you alluded to but don't really fairly state my judgment. I say, "I'm not going to take any action at this time."

I said—well, here's—you said, "I've noticed over a period of several days that a couple of jurors in particular have been taking long naps during the trial." And I said—well I didn't notice that.

(p. 19-31) But at any rate, I said, "I'm not going to take action at this time. If any of you think that you see that happening, ask for a bench conference, come up and tell me about it and I'll figure out what to do about it. And I'll"—well I just mentioned that I might have them stand up or take a recess.

I will file this.

Now if there were other occasions, I don't remember it. The full repeat of the record will reflect it, but I don't think you or anybody else called to my attention to anything else like that.

I want to say that we are now in the courtroom where—and I want to say for the record here that the trial of this

case started out in Courtroom No. 2. The jury was selected in Courtroom No. 2 which is down the hall. And we were there from February 15 to February 21st. Not all of that time was spent in the jury room.

On February 21st we moved to this courtroom, Courtroom No. 1, which is the courtroom I'm more familiar with. We're in here now. And it is a traditional—actually a traditional size courtroom.

At the time of the Watergate trial I noted the way the defendants were seated in that courtroom, and I had a case coming up where I wanted to do something like that, so I—and there was a diagram of that case—(p. 19-32) of that courtroom used by Judge Sireca in Time Magazine and it gave the distance and the size, and I had this courtroom measured and this is exactly the same as that size courtroom.

It has—there are no columns in the courtroom. The Judge, who's seated on the bench, is about four or five feet above the level of the floor, has an unobstructed view of the entire courtroom, counsel table, jury box.

The way I have the courtroom, and had it arranged for trial of this case, the Government counsel sit facing the Judge. Defense counsel sit as they are now seated, facing the jury box. There is a rail, of course, in front of the jury box but you can see the jurors above that rail, I think, seated from counsel table.

I haven't measured it but I would estimate it's about 30 feet from the jury box to counsel table, more or less; that's about right. So that there are no nooks or crannies or columns to get behind; no shaddowy places, it's well lit. I have mentally compared it to being in a goldfish bowl.

I can tell you that the Marshal is seated now in the extreme left rear of this courtroom and I can see when he puts his finger on his nose, which he's now (p. 19-33) doing. And I can see what's happening in this courtroom.

And while I do not normally sit and watch the jury—and by the way, there was a discussion—off-the-record discussion about this matter shown by the transcript—it doesn't say what it was. I remember what it was, I told you about the pornography trial where the defendants contended the jury was not watching the movie being shown. And therefore I said rather than I watch the movie, which I didn't particularly want to watch, I wasn't interested in it at all, that I watch the jury to be sure they were watching the movie. That's the story I told.

Now I don't normally sit and watch the jury, but I watch them once in a while and I see what's happening. And I'm not going to testify or attempt to testify except to say that—well I won't say anything—about whether anybody was sleeping in the courtroom or not.

So much for that. Anything else, Mr. Milbrath?

MR. MILBRATH: Your Honor, you've raised some questions about the impact of Rule 606. I would submit to you—

THE COURT: Well I raised that in my Order. I don't think—don't you think it impacts?

(p. 19-34) MR. MILBRATH: Yes. And I think I've outlined why.

THE COURT: Here's what the rule says. The rule says that you shall not inquire about certain things and that no affidavit about certain things shall be considered.

So I take the position that Rule 606 determines what is and is not admissible evidence for the purpose of determining the issue here in this case. And therefore it's important to analyze Rule 606(b) and—to determine what is and what is not, quote, outside influence.

MR. MILBRATH: Well—

THE COURT: So it does impact very much.

MR. MILBRATH: Very much so. But I want the record clear on my position. My motion first is that—

THE COURT: Well—go ahead.

MR. MILBRATH: —that the Sixth Amendment is the governing standard here on the basis of *Smith vs. Phillips* and *Trembell vs. United States* and the other cases that we've cited. And to the extent that Rule 606(b) is inconsistent with those cases insofar as recognizing the right to a full and fair evidentiary hearing to inquire into use of intoxicating beverages or such irregularities, Rule 606(b) is specifically (p. 19-35) overruled by the Sixth Amendment.

But beyond that, I think the language of the rule itself as interpreted by Weinstein and the cases that I've cited to you clearly stand for the proposition that evidence, even by a juror, of extra—outside influence of any kind is completely admissible. And I think that's what we have here. I think it—

THE COURT: Do you have any case that deals specifically with alleged intoxication?

MR. MILBRATH: *United States vs. Provenzano* does—

THE COURT: Well that—

MR. MILBRATH: —it was decided in 1979, I think, which is well after the adoption of the Federal Rules of Evidence.

THE COURT: But it was a motion for a new trial.

MR. MILBRATH: And there was a hearing. And the only question was: Was there sufficient evidence to prejudice. And the Court said no, there wasn't in that case. They didn't say no, you can't have a hearing to prove whether there was prejudice or not. The Court presupposed an evidentiary hearing.

And I suggest—

THE COURT: And presupposed that somebody had (p. 19-36) been drinking on the jury.

MR. MILBRATH: No. The Court presupposed an evidentiary hearing, as I recall the case, to inquire into whether someone had been drinking.

In terms of what is an outside influence, I suggest to you that the decisions of the various State courts are somewhat persuasive on that inasmuch as that they're dealing with a common law rule against impeachment. And I've cited to you the annotation on the use of intoxicating liquor by jurors, which is at 7 ALR 3rd 1040.

And I suggest to you that the Florida Supreme Court case discussed that annotation and the other court cases all over the states are consistent with the rule advocated by Weinstein; and that is that there is a presumption of prejudice in that setting and that the State has the burden of proof that the use of alcohol did not taint the verdict. And the only way that can be done is by an evidentiary hearing.

The Fifth Circuit in the *Chintese* case, which is at 582 F.2nd 974, a 1978 case, again well after the adoption of the Rule 606(b), states that "Where the jury misconduct involves influences from outside sources, the failure of the trial Judge to hold a hearing constitutes an abuse of discretion and is therefore reversible (p. 19-37) error."

And I suggest to you that the use of alcohol during lunch breaks to the extent described by Mrs. Asbel, that the jurors were nodding off during the trial and bragging about liquid lunches, that is an outside source inasmuch as it precludes the effective hearing and attention to all the evidence in the trial; and by her own statement it does.

And I don't see how Mrs. Asbel's testimony could possibly be foreclosed under Rule 606.

Beyond that, your Honor, our position is we're entitled to an evidentiary hearing to produce evidence from other persons who were not jurors in the case to demonstrate that Mrs. Asbel's allegations are true. And we have an affidavit from one such person who, I believe—

THE COURT: Is that in this—you filed it?

MR. MILBRATH: We have not filed it yet. My intention is to request an evidentiary hearing both for the taking of testimony from Mrs. Asbel and the other jurors but also—

THE COURT: You have an affidavit to what effect from a non-juror?

MR. MILBRATH: From a non-juror, yes, sir.

THE COURT: What's he going to—what does (p. 19-38) that person say?

MR. MILBRATH: I have a sworn statement from Fred Van Lengen. Mr. Van Lengen overheard in the Federal building, outside this courtroom, statements to the effect of—by these—some of these male jurors are going out for drinks.

THE COURT: They were going out for drinks?

MR. MILBRATH: Yes, sir. And having liquid lunches.

THE COURT: Well are you suggesting that having a liquid lunch in and of itself—let me—I want to refer to the Provenzano case, reported at 620 F.2nd 986, a 1980 case decided in the Third Circuit, and from Page 996 under the section called "Jury Misconduct," this is what that case is about, and I'm quoting:

"The jury in this case was sequestered," that means under the control of the Marshals, not allowed to go home, "Toward the end of the trial at about 8:00 a.m., a Marshal discovered a juror and two alternate jurors smoking marijuana and reported the incident to the District Judge, who informed counsel. The District Judge suggested no action be taken. Defense counsel, after conferring among themselves, agreed but suggested in addition that the District Judge tell the offenders," (p. 19-39) that's the smokee—the smokers, "not to be concerned about the incident and they would not be prosecuted."

MR. MILBRATH: I believe that they said that they waived any right—

THE COURT: "The District Judge did as counsel requested." They later changed their mind about that.

But anyway, go back to the quote.

"The District Judge did as counsel requested. None of the appellants were personally present at the conference when counsel was informed of the incident. In fact, none of them found out about it until after the trial." Their lawyers were there but they weren't.

"Appellants now challenge the course of conduct chosen by the District Court claiming that he should have dismissed the offenders," that's the jurors, "to sponte," on his own, "without soliciting or accepting counsel's advice."

That certainly would have left things in a mess.

"We see no reason to depart from a longstanding rule that counsel's intentional, practical decisions at trial bind his client. For the same reason, the District Court did not err in denying Appellant's motion for a new trial on the ground of untimeliness since counsel, even if not Appellant, knew (p. 19-40) of the incident before. So it was not newly discovered evidence and the motion was not made within seven days."

Well then skipping down, and this is the Third Circuit speaking, and I think a little more unusual case than we have here. This was a Judge Garth, Circuit Judge Garth of the Third Circuit speaking, he said, "While possession of marijuana is illegal under both Federal and State law, since none of the offending jurors was ever charged or convicted, they would not be disqualified from service as a result of violating the law."

"And without engaging in extened philosophical discussion of where we might draw a line in the proper case, we hold as well that the public knowledge of sitting jurors was smoking marijuana does not create such an appearance

of impropriety as to warrant reversal of convictions where the jurors were not dismissed. Nor is there any serious contention that the drug's intoxicating effect affected the juror's ability to hear evidence or to deliberate."

MR. MILBRATH: That's the distinction here, your Honor.

THE COURT: No one suggested—well "any serious contention" now, that's doesn't say any allegation.

(p. 19-41) "No one suggested this be the case following the day of trial. And the District Judge later observed when denying the new trial motion that the jurors had not been in any way impaired from functioning as such."

Now I'm quoting, "The modern view is that the consumption of alcohol is not prejudicial as a matter of law." This is from the case you cited.

MR. MILBRATH: Yes, sir.

THE COURT: "And Appellants have not demonstrated prejudice as required by cases such as *United States vs. Taliaferro.*"

MR. MILBRATH: I have a copy —

THE COURT: And that's what that case is about.

MR. MILBRATH: Well I have a copy of *Taliaferro,* and I can give that to your Honor.

THE COURT: Well I have it right in front of me. If you want me to look at it, I'll look at it.

MR. MILBRATH: Yes, sir.

THE COURT: All right. That case is decided in the Fourth Circuit in 1977, it's reported at 558 F.2nd at Page 724.

The Defendant was convicted in the United States District Court for the Eastern District of Virginia of conspiracy to commit bank robbery and the Court of Appeals held that the trial Court did not (p. 19-42) abuse its discretion in granting a continuance at the request of the United States Attorney's office. And that apparently was the point of the decision.

But there is discussion —

MR. MILBRATH: It's found at Page 725, your Honor.

THE COURT: Yes. I just wanted to see where to — "The Jury had been deliberating for sometime and several hours later they reported it was still deadlocked. The Judge re-read the entire charge to them. He then sent the jurors to dinner at a private club and instructed them that they could continue deliberating during dinner if they wished but only when no one else was in the room. The Judge gave the jurors permission to have alcoholic beverages with their meal. Fifteen minutes after returning from dinner the jury reported its guilty verdict."

I might say if I were that defendant I think I would have appealed also.

But at any rate — and this Circuit — it says, the Fourth Circuit, "This Circuit has approved the modified *Allen* charge."

MR. MILBRATH: They then discussed the drinking issue further down on Page 725.

THE COURT: Well I'm going to read to myself (p. 19-43) the whole thing. This is a very interesting case.

Taliaferro argues that the jury's verdict must be set aside because the jury was permitted to deliberate over dinner in a place outside the Court's control. It appears from the record there is a problem whether jurors ate dinner, submitted by Taliaferro, after hearing on his motion for a new trial, that the group of 12 jurors ordered 10 cocktails and 2 soft drinks. The Marshal who accompanied the jurors to the club testified that only one round of drinks was ordered. The most obvious inferences from these two facts is that 10 of the 12 jurors had one cocktail apiece and the remaining 2 jurors had soft drinks.

"Although we look with disfavor on the practice of allowing jurors to have alcoholic beverages during their deliberations" — that was a wise statement — "the mere fact that they were so allowed in this case does not require a new trial. The Defendant must show that he was prejudiced; that is, that a juror became intoxicated so that he or she was affected in the performance of his or her duty.

"Taliaferro has made no showing of prejudice and the District Court found that none existed following an evidentiary hearing held in conection with Taliaferro's motion for a new trial. The fact that 10 (p. 19-44) jurors each had one drink is not in and of itself a sufficient showing of prejudice. Moreover, the Marshal testified that when he accompanied the jurors back to the courthouse after dinner, none of them appeared intoxicated."

MR. MILBRATH: There they had a full evidentiary hearing to explore the issue.

THE COURT: It doesn't say — and I'm not — I just want to be sure. It doesn't say that they asked the jurors anything.

It says, "Following an evidentiary hearing — "Taliaferro has made no showing of prejudice and the District Court found that none existed following an evidentiary hearing held in connection with Taliaferro's motion for a new trial."

"The fact that 10 jurors" — then it says "The Marshal testified". All right.

MR. MILBRATH: Then I think these facts are far more appealing than those except that there the Judge made —

THE COURT: You do? You think in this case?

MR. MILBRATH: Yes.

MR. MILBRATH: Because —

THE COURT: Ms. Asbel said that several men — or some places she said the men were drinking and some (p. 19-45) places she said the ladies had cocktails.

MR. MILBRATH: Some of the ladies had cocktails and the men had drinks on several occasions, they bragged about liquid lunches, didn't hear what was going on in the trial and slept.

Now here we have —

THE COURT: Well those things, you see, she would not be able to testify about.

MR. MILBRATH: I think she would be able to testify —

THE COURT: What happened in the jury room — she just can't do that. What you're doing is not reading about half of Rule 606.

What else do you have to say? Anything else?

MR. MILBRATH: I think she can testify about the fact they were nodding off during the trial itself as we were sitting here trying to try this case.

THE COURT: "Trying." You were trying it.

MR. MILBRATH: Well evidently they weren't listening or at least some of them weren't.

THE COURT: Well I guess she could testify about what happened in the courtroom in front of everybody else. And I guess you could call everybody else who was here to testify also about that.

MR. MILBRATH: I would also point out that (p. 19-46) the Court excused these jurors and told them not to deliberate while at lunch.

THE COURT: You mean in our case?

MR. MILBRATH: Yes.

THE COURT: Well I did.

MR. MILBRATH: Every inference from Ms. Asbel's affidavit indicates they had and probably were consuming alcohol during the deliberations —

THE COURT: Oh —

MR. MILBRATH: — at lunch itself.

THE COURT: Mr. Milbrath, you're reaching. Nobody's ever said they deliberated any place other than in the jury room.

MR. MILBRATH: There's only one way to find out, your Honor, and that's to have an evidentiary hearing.

THE COURT: You know — and I say this for the benefit of the non-lawyers in the room, and there are some very interested persons who are non-lawyers — the law is the law and it's the result of frequent experience that leads back sometimes hundreds of years and results from deliberation by members of Congress and the Legislature, and once they have passed the law it applies to everybody. We may or may not agree with it, we may or may not like it, we may or may not have (p. 19-47) done the same thing ourselves, but we are bound to follow it.

Now Rule 606 of the Federal Rules of Evidence is entitled "Compentency of Jurors as Witnesses". And it reads, "Upon an inquiry into the validity of a verdict, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberation or to the effect of anything upon his or any other juror's mind or emotions as influencing him to ascent to or to descent from the verdict or indictment or concerning his mental processes in connection therewith except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror; nor may his affidavit or evidence of any statement by him concerning the matter about which he would be precluded from testifying be received for these purposes."

Now the Advisory notes — points out that under the Federal decisions a central focus and reason for this kind

of a rule is to insulate the manner in which a jury reaches its verdict so as to bring some finality to the decision made by jurors.

Now the jury system is not perfect. It (p. 19-48) employs the use of human beings; humans are not perfect. But the jury system is the best system known to man, in my judgment, for making decisions about important questions of fact which are submitted to the jury.

There is a great mystery about what goes on in the jury room and that is a — not by accident. Cases have been reversed where it has been found that third persons were in the jury room improperly during deliberations.

It would be — everybody, lawyers everywhere would like to have, if they could get them legally, video tapes or some device to overhear what jurors say and do, but it's strictly prohibited.

There are two doors to the jury room, a door, then a sound barrier, then another door, by accident. There are two restrooms in the jury room. There's a water fountain. The jurors are supposed to stay in that jury room while they're deliberating, if they do; no one else is in there, nobody records it or transcribes it or takes it down.

Unless there's some outside influences, when that jury comes out and reports its verdict, the Court asks, as they did in this case, through the Clerk — and the procedure I follow is to have the Clerk read the verdict. While that's being done I watch the (p. 19-49) jurors. I then ask the Clerk to poll the jurors, to ask each juror if these are his or her verdicts. While that's happening, I'm not asking anybody anything, I'm not reading anything, I'm looking

at the jurors. If there's the slightest hesitation I require that there be some affirmative statement made.

That was done in this case. There's a transcript of it; the Government has furnished it. And it shows what was fact, that every member of this jury, including Mrs. Asbel, said these were her verdict. The verdicts were filed and they were inspected.

And the purpose of this rule is just to — so that this case would not go on forever. There must be finality. There must be some mystery about what goes on in the jury room. Lawyers traditionally and hundreds of years have accepted that principle. It is the principle of law and I'm bound by it.

Now what says the Government? And I want to hear particularly what you have to say about the suggestion that there should be an evidentiary hearing about any matters that are admissible under Rule 606 and to be obtained from any member of the jury or from any other person not a member of the jury.

MR. RUNYON: Yes, sir. I'll be brief.

The Government would rely on Mr. Zitek's (p. 19-50) memorandum of law. There are two case, however, that have come up since he wrote that memorandum which clearly states — and they are Eleventh Circuit decisions — which clearly states that it is in the broad discretion of the trial Judge whether or not an evidentiary hearing should be held.

In both cases — that would be *United States vs. Hubert Yonn,* and the cite on that is 702 F.2nd 1341, and it's an Eleventh Circuit case decided April 22, 1983; and also

United States vs. Williams, which is cited at 716 F.2nd 864, that also is an Eleventh Circuit case decided on October 2, 1982.

In both cases there were allegations of jury misconduct —

THE COURT: I want to see them.

MR. RUNYON: Yes, sir. In both cases the trial Judge used its discretion and denied an evidentiary hearing, and in both cases the Appellate Courts have upheld both of those decisions not to have an evidentiary hearing, stating that the trial Judge is in a position to determine whether or not one is necessary; and when he feels one is not neecssary, unless you can show an abusive discretion of his decision it should be held on appeal.

And that's exactly what's here. Both cases (p. 19-51) there were allegations of jury misconduct and in both cases the trial Judge declined to have an evidentiary hearing.

And we cite that for the proposition that Mr. Milbrath is not correct that your Honor must in fact have an evidentiary hearing. Those two cases are completely contrary to that position.

THE COURT: Well I'm looking at the Yonn case which, as you say, is reported at 702 F.2nd 1341. At Page 1344 this appears: "First, all three of the Appellants contend that the District Court committed reversible error by the manner in which it investigated an allegation of jury misconduct. The problem arose on the third day of the trial. During a recess one of the jurors informed

the Marshal that another juror had improperly expressed her opinion on the weight of the evidence.

"As the reporting juror recognized, the comment violated the Court's earlier instruction admonishing the jury not to engage in pre-deliberation discussion concerning the case and not to form an opinion until it was submitted to them for a decision.

"Advised of the incident, the trial Judge alerted all counsel of his intention to interrogate the jurors individually. Over Defendant's objection, the (p. 19-52) Court proceeded to question each juror outside of the presence of counsel for both sides. He first talked with the juror who had originally reported the remarks. The inquiry revealed that one of the jurors had stated that the Government's chief witness Dosher was a pimp and that she did not believe him and that she had already formed an opinion as to the Defendant's innocence. Four other jurors acknowledged hearing the remark but all of them assured the Judge that the comment would not affect their impartiality.

"Pursuant to the Judge's direction, the Court Reporter transcribed all interviews. After completing his investigation, the jury (sic) informed all the counsel of his findings. Without disclosing the identity of the jurors involved or the substance of the improper remarks, the Court stated that one juror had indeed violated his admonition against pre-deliberation discussion in forming a premature opinion.

"The Judge further announced that the remaining jurors including the one juror who initially reported the comment were still capable of rendering an impartial ver-

dict. He also expressed his willingness to excuse the juror guilty of the impropriety. The Government moved the Court to excuse that juror. The Judge granted the motion over the Defendant's objection (p. 19-53) and replaced the dismissed juror with the only alternate previously selected by the parties."

The Court says, "Any challenge of the District Court's investigation must be viewed in the context of his broad discretion before the trial Judge is confronted with such an allegation of jury misconduct." That did not involve this type situation.

It was appealed from the Northern District of Florida, Judge Higby. The opinion from the Eleventh Circuit was written in 1983. There was a dissent; I'm reading it.

The dissent did not deal at all with this question, it dealt with the matter of the admissibility of some surveillance.

The case of *United States vs. Williams*, cited — it was not argued by the challenger — in 1983 in the Eleventh Circuit, rehearing and rehearing en banc, denied, reported at 715 F.2nd Page 864. Two defendants were convicted of bank robbery, on appeal said the two issues raised on the appeal, neither one of them required reversal. They don't tell us very much about the second one, they just say, "We have repeatedly held that the District Court has broad discretion of deciding whether to interrogate jurors with regard to alleged misconduct. The District Court was in the best position (p. 19-54) to determine whether the facts reflected by counsel's statement as to the jurys discussion of the case prior to submission could be cured from error by instructions as given. The District Court did not abuse its discretion."

Well they're not really — I appreciate it, we ought to have all the cases that touch on this subject —

MR. RUNYON: Other than that I cite —

THE COURT: — but they aren't decisive and don't deal with this exact point. You don't need to cite any authority about the Court's judicial discretion in this matter.

MR. RUNYON: Judge, I will just reiterate the Government's position that this is not an outside influence as contemplated under 606(b). Alcohol, as your Honor stated, they took in in their stomachs is not something that's contemplated; and therefore an interview of the jurors should not be granted.

MR. BEST: Your Honor, may it please the Court. Before your Honor rules, may I offer the sworn statement of Fred Van Lengen as part of the record?

THE COURT: Sure.

MR. BEST: I apologize to the Court, I don't have copies but I guess we can get them later from the (p. 19-55) Clerk.

One more thing, Your Honor —

THE COURT: Well first let me read this.

Well, the affect of this is that a Mr. Van Lengen, L-e-n-g-e-n worked for Norrell Temporary Services which was employed by Mr. Best's lawfirm to observe the proceedings in this trial. And during — it says between the third week of the trial, sometime in February or late March — late February or March he saw three male jurors in this case going down the stairs and he was going down

the stairs and he overheard them talk about their luncheon plans. One of them said, "Where are we going to drink our lunch this afternoon?" or words to that effect. And the other jurors — one of the other jurors said, Well let's go to some place which he doesn't remember the name of. They they all went off, ostensibly to drink their lunch. And that's the sense of that.

All right. It's received.

MR. BEST: Your Honor, one more matter.

THE COURT: Yes, sir.

MR. BEST: Your Honor made preliminary statements before a hearing of counsel, I have a somewhat vague recollection that your Honor said that you didn't notice any jurors sleeping, and then later in (p. 19-56) those statements you appeared to be about to make a statement and then said, "I do not have a statement in that regard" or words to that effect.

THE COURT: No. I don't really — I never did really say that I didn't see anybody sleeping because I don't think that's appropriate for a Judge to testify. So you may have inferred that from what I said; and I think you might well do it. You might infer from the fact that I am a Judge sitting up here where I can see everything, that if I had seen somebody sleeping I would have done something about that. I'll stand behind that.

Now go ahead.

MR. BEST: Well since this is not an evidentiary hearing, I do not intend to testify in that regard either except that I would say that I have evidence to proffer,

if the Court's inclined to hear it, about what I saw in the jury box.

THE COURT: Well if you want to say what you saw — I'll just rely on this. We had the hearing and I said to the lawyers, if you see anything that you think ought to be brought to my attention, come up and tell me about it.

Now you can tell me — it's a little late now but if you can tell me what you saw, then you can.

(p. 19-57) MR. BEST: Well —

THE COURT: And if you want to do that, then I'll also say I didn't see anybody sleeping. I saw some people looking sleepy.

MR. BEST: Well I saw several jurors, on occasion several at a time, sleeping soundly. Not just nodding off but in a full, sound sleep.

THE COURT: Well why didn't you come up and tell me about that?

MR. BEST: Well, sir, your Honor, at that point, frankly, I didn't deem it appropriate. We had already commented to the Court about it. It was a boring case, it was hot in here on occasion, and frankly I didn't think it was appropriate at the time.

THE COURT: All right.

MR. BEST: At that time, I would point out, I did not know or had any reason to believe that anybody had been drinking during the lunch break.

THE COURT: Let's see. I think we're going to stop this now.

MR. BEST: Okay.

THE COURT: I — do you have anything — I have accepted Mr. Van Lengen's affidavit. It's made part of the record. And I would say that that is admissible evidence.

(p. 19-58) Now does anybody want to have an evidentiary hearing about anything else that occurred by some person other than a juror?

MR. BEST: Yes, sir. I have a matter that I would like to now or at some later date if we do have an evidentiary hearing report, which did not seem significant enough to bring to the attention of the Court at the time but in retrospect does, involving what I observed about one of the jurors.

THE COURT: About what you observed in the courtroom here?

MR. BEST: No, sir, outside the courtroom.

THE COURT: Well there's nothing to preclude an attorney from being a witness.

All right. Anything else — let's don't get into that. I think that may be — we might do it right now or — anybody got anything else?

MR. BEST: Not I, your Honor.

MR. RUNYON: No, sir.

THE COURT: Well I'll receive that right now if you want to — why don't you come up, be sworn, take the witness stand and tell us.

MR. BEST: It's not every day that I get to take the stand.

THE COURT: That's right.

(p. 19-59) DAVID R. BEST, SWORN

THE CLERK: Please be seated in the witness box.

THE COURT: Now you are Mr. David Best, an attorney in this case and you're well known to that fact.

Now what do you have to say?

THE WITNESS: Your Honor, some point about the middle of the trial I was in the men's room, which is in the southwest corner of the third floor; we're in the southeast corner. A juror whose name as I recall, David Hardy, who was the large gentleman seated in the third or fourth seat, front row, looking right to left, was standing in the restroom using the bathroom facilities, and I didn't really notice who it was, and I was there too, and began talking to me. I looked around and noticed it was a juror, and I said something to the effect that it would not be appropriate if we talked, don't mean to be discourteous.

At which point he seemed to be in a sort of giggly mood and said a few other things, innocuous things like the weather and — but addressed to me. And I said again, "Sir, I don't mean to be rude but it would be inappropriate for me to talk," and I walked out.

(p. 19-60) In retrospect it seems funny. At the time I commented to my client and possibly to co-counsel that the man acted in a strange manner. Having no idea that he might have been drinking, I didn't bring it to anybody's attention, I didn't say anything about the case nor did he.

In retrospect he might well have been intoxicated. And I — I think there's a reasonable — it's reasonable to assume that he was. Based on the way he behaved, it was inconsistent with the way I had seen him behave in the halls on other occasions, during which time he would just nod and walk on by.

And I remember saying to some of the members of the defense team that the man acted strangely. But I did not think for a moment that he had been intoxicated or drinking at the time because I had no reason to believe they were drinking.

And that's really the extent of it.

THE COURT: All right. Thank you.

MR. BEST: Your Honor, that was the same juror, if your Honor recalls — I don't remember if it was the same day or not but we were having a bench conference, and that same juror simply got up and walked out of the courtroom. And another juror announced when we noticed the empty chair that he had (p. 19-61) gone to the bathroom. That's the same gentleman I refer to.

THE COURT: All right. Now I could call all of the Marshals who worked during this trial. I could call the courtroom deputy but I — and the Court can do that, call witnesses, but I don't think I'm going to do that. I haven't talked to them. Anybody else that wants to call them they can.

I can just state that as a matter of fact I have been working with these courtroom personnel for a good many years and that on occasions when something happened or

— with regard to the jury which should have been brought to my attention, they did bring it to my attention.

Nothing was brought to my attention in this case about anybody appearing to be intoxicated or being intoxicated. I saw nothing that suggested they were.

After a suggestion of intoxication is raised it's always easy in hindsight to think back to the conduct that might have appeared normal but which, if you consider it as to whether the person was intoxicated then you decide that it was.

So nobody else wants — does anybody else want to call any further testimony?

I am satisfied and I find that given the (p. 19-62) strict application of Rule 606(b) Federal Rules of Evidence, which I — which is the law and I'm bound by it and which I think should be the law, that there is no admissible evidence which could be or can be obtained from any member of the jury who served in this case. And therefore, I am not going to order or allow an evidentiary hearing of or from the jurors.

I do report that the foreperson of the jury called my office, did not talk to me, talked to my secretary. She wanted to know when there was going to be a hearing and she wanted to testify. And the indication was that she was upset by the allegations that she read in the newspaper of Mrs. Asbel.

But that's — we've heard that from Mr. Best of what Mrs. Asbel said.

Now, I'm not influenced by that one way or another. Her testimony wouldn't be admissible either.

I am satisfied that taking at their face and accepting it as being a fact that one or more of these jurors may have consumed alcoholic beverages at various luncheon recesses in this trial are not in and of themselves a ground for challenging the verdicts in this case.

There has been no — I find there's been no showing or suggestion of any extraneous prejudicial (p. 19-63) outside information being brought to bear upon any member of this deliberating jury in this case, and all other suggestions that deal with matters which are precluded from being considered or admitted — being admitted into evidence ought to be admitted, precluded.

I presided at the trial of this case, I observed everything there was to observe, and I am satisfied that the motion to interview the jurors should be and is denied as to both defendants, as previously denied motions for a new trial, I see nothing new to be considered. But considering all the allegations in your motion, I'm satisfied that the motion for a new trial should be and each is denied.

I think those are all the motions pending. I received all other evidentiary material that was offered dealing with non-jurors. I'm considering and accepting the statements of the lawyers of what they saw or heard because I've made certain statements of what should have been done.

I think those are all the motions that are pending, aren't they? Any other motions?

MR. LAZZARA: No.

THE COURT: Well there is the matter of the sentencing date. The defendants of course are not anxious

to be sentenced, I understand that; and I'm not (p. 19-64) anxious to sentence them but it must be done and I have to set a date.

MR. RUNYON: Your Honor, if it's convenient for the Court, Mr. Zitek has expressed a desire to be here; he unfortunately is in trial in Jacksonville, but they do not work on Fridays. So, your Honor, if it's possible to set a sentencing date on a Friday, he would appreciate it.

THE COURT: Well I normally do. Today is May 30th. I have in mind, and I'll hear from defendants about this, but I have in mind setting it Friday, June the 29th, and I find good cause to exist for having extended the sentencing date.

Anybody that wants to be sentenced earlier than that, I'll hear you.

Does that create any problems for you, Mr. Lazzara?

MR. LAZZARA: No, sir.

THE COURT: How about for Mr. Conover?

MR. LAZZARA: He'll be here, Judge. What time will that be in the morning, your Honor?

THE COURT: Well 11:00 o'clock.

MR. BEST: Your Honor, that creates no problem for either me or Mr. Tanner.

THE COURT: All right. Then I am going to (p. 19-65) set it and the Clerk will notice sentencing in this case for 11:00 a.m., June the 29th.

Now I think the presentences—well I know they are because we were practically prepared to conduct this hearing

and I was prepared for it and I've frankly examined the presentence reports and I presume the defendants counsel who wish to do so have done that. I've received a good deal of other materials submitted and I've re-examined all of that and it will be available; they were all letters submitted on behalf of one or more defendants.

But I'll show you what I considered on the day of the sentencing.

Do you have any questions now that would expedite it?

MR. BEST: No, sir.

THE COURT: About the sentencing procedure?

All right. Thank you.

THE MARSHAL: All rise.

THE COURT: Excuse me. You will remember there is a rule, part of the Florida Code of Professional Responsibility adopted which precludes attorneys from interviewing, or their agents from interviewing members of the jury without notice to the Court, and that's prior notice and not—you just don't say, "I'm on my (p. 19-66) way to do it." The presumption is the other side won't have a chance to object.

So that is now in effect. In other words, my previous order to the effect is no longer in effect, but that rule does apply.

So if you decide to do that or have some investigator do that, you have to notice to have a hearing.

Thank you.

(Proceedings recessed at 11:45 until June 29, 1984 at 11:00 a.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record in the proceedings in the above-entitled matter.

/s/ Kathryn Bryant — 10-12-84
Court Reporter — Date

(Defendants' Exhibit in Support of motion to interview jurors, Tr. 19-55)

SWORN STATEMENT

FRED VAN LENGEN

PERSON INTERVIEWED: Fred Van Lengen
DATE OF INTERVIEW: May 14, 1984
PLACE OF INTERVIEW: Hyatt Regency Hotel
Tampa, Florida

INTERVIEWED BY: O. Douglas Beard

Investigative Research, Inc.

Mr. Beard: Mr. Van Lengen, you know me as Douglas Beard. You know that I'm a private investigator. You know that during our previous contact I was employed by David Best, who is an attorney that represented Anthony Tanner in a recent trial in Tampa, Florida. Do you understand who I am and what I'm doing here today?

Mr. Van Lengen: Yes. I do.

Mr. Beard: All right. I've also explained to you that our conversation is being tape recorded. Do you understand that the tape recorder is on now?

Mr. Van Lengen: I understand that.

Mr. Beard: Do I have your permission to tape record our conversation?

Mr. Van Lengen: Yes, you do.

Mr. Beard: All right. Mr. Van Lengen, I would like to talk to you specifically about your observations, what you saw and what you heard during the third week of the

Tanner trial, which occurred during February and March, 1984. Specifically I'm interested in your

(p. 2) Statement: Van Lengen

observations of three white male jurors, and before we get started as to specific questions, I want to ask you if at any time you were asked by Anthony Tanner, David Best, myself or anyone associated with the defendants to make any effort to observe, overhear, eavesdrop, anything of that nature with regard to the jurors in this case?

Mr. Van Lengen: No, I was never asked to do any of those things.

Mr. Beard: All right. Mr. Van Lengen, exactly what was your position in this trial? How did you come to be involved?

Mr. Van Lengen: I was hired through a temporary agency which I worked for known as Norrell Temporary Services. They hired me out to your law firm in order to observe the proceedings in a Federal trial which was Anthony Tanner and William Conover versus United States Government. My job was to observe the trial and to answer questions put to me by the law firm involved.

Mr. Beard: During the third week of trial, did you have occasion to overhear a conversation between three of the jurors?

Mr. Van Lengen: Yes, I did.

Mr. Beard: Can you tell me how you had occasion to overhear that conversation?

Mr. Van Lengen: Yes, I will. We, the court was recessed for lunch and I left the court room and was on my way out of the Federal Building and I took the stairs. In front of me going down the stairs were three of the jurors

and they were the three male white jurors which you spoke of.

Mr. Beard: Would you describe them for me?

Mr. Van Lengen: Well, one of them was a rather large fellow. He had dark hair and facial hair. I believe he had side burns and he had a beard. The other fellow was a blond haired guy, he had a receding hair line, rather thin. And the other, the third, was an Irish looking guy. He had, well the girls said he had good looking eyes and he had dark curly short hair. All three of them were rather young. I'd say none of them were out of their mid 20's.

Mr. Beard: All right. Where were they standing when you heard the conversation?

(p. 3) Statement: Van Lengen

Mr. Van Lengen: Well, at the point at which the conversation occurred, they were exiting the south end of the Federal Building and they were on the sidewalk walking out of the Federal Building.

Mr. Beard: Would you tell me what was said and who said it?

Mr. Van Lengen: Well, the big surly looking guy said um, where are we going to drink our lunch this afternoon, or words to that effect. And one of the other two, and I don't remember now which one said it, but one of the other two said, well let's go to this particular place, and I don't even now recall the name of the place he mentioned, but ah, the surly guy answered no, let's not go there we went there yesterday and ah, and then the conversation drifted into other directions. They talked about well, were's your car parked and ah, it's over here. I don't remember which one of them said that, but it was something to that effect.

They'd, they took off in another direction from where I was so that was really the extent of what I heard.

Mr. Beard: All right. Mr. Van Lengen, you had occasion to observe these jurors in the court room for about five weeks. Is that correct?

Mr. Van Lengen: Yes, I did.

Mr. Beard: And there's no doubt in your mind who the jurors were? You are certain that those three men that were talking were in fact jurors on the Tanner/Conover trial?

Mr. Van Lengen: Yes. I became quite familiar with their faces.

Mr. Beard: Mr. Van Lengen, during the course of this trial, did you often see the three jurors that we're talking about together?

Mr. Van Lengen: Yes, I saw them quite frequently together.

Mr. Beard: When did you see them together?

Mr. Van Lengen: During the recesses at lunch time and um, a few times in the afternoon after the trial had been um, recessed for the day, I saw them leaving the court room together.

Mr. Beard: Mr. Van Lengen, I am a notary public in the State of Florida, which essentially means I'm authorized to swear persons to their statement. Would you raise your right hand for me. Do you swear the statement

(p. 4) Statement: Van Lengen

you have just made is the truth, the whole truth and nothing but the truth?

Mr. Van Lengen: I do.

Mr. Beard: Thank you sir.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 83-70 Cr-T-8

WILLIAM M. CONOVER and
ANTHONY R. TANNER,

Defendant.

ORDER

(Filed May 30, 1984)

Defendants' motions for leave to interview jurors and for order dismissing the indictment or alternatively, for new trial were heard on May 30, 1984.

Because of the nature of the matters involved and in the interest of justice, the hearing was in a closed courtroom. The parties, their attorneys, and relatives of the defendants were present. None of the parties objected to the hearing being closed.

The proceedings were reported and a transcript thereof is available to the parties upon request and payment for the same. The Court made findings in the record. As indicated therein, given the effect of Rule 606(b) of the Federal Rules of Evidence I found that defendants had not alleged or offered to prove that extraneous prejudicial information was improperly brought to the jurors attention or that any outside influence was improperly brought to bear upon any juror. On the basis of the admissible evidence offered I specifically find that the motions for leave

to interview jurors or for an evidentiary hearing at which jurors would be witnesses is not required or appropriate. I further found and find that motions for an order dismissing the indictment or alternatively granting a new trial should be respectively and each is, DENIED.

The Clerk was directed to schedule sentencing of the defendants for 11 a.m. on June 29, 1984.

IT IS SO ORDERED at Tampa, Florida, this 30 day of May, 1984.

/s/ Ben Krentzman
Senior U. S. District Judge

UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF FLORIDA—TAMPA

Docket No. 83-0070-Cr-T-08

United States of America vs. WILLIAM M. CONOVER

Defendant.

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, 06/29/84.

Counsel: [ ] Without Counsel. However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel. [X] With Counsel Richard Lazzara.

Plea: [ ]Guilty, and the court being satisfied that there is a factual basis for the plea. [ ] Nolo Contendere, [X] Not Guilty.

Finding & Judgment: There being a verdict of [ ] Not Guilty, Defendant is discharged; [X] Guilty. Defendant has been convicted as charged of the offense(s) of conspiracy to defraud the United States in violation of Title 18, United States Code, Sections 371, 1341 and 1001, as charged in the Indictment.

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) Months as to Count 1, Eighteen (18) Months as to Count 2, Eighteen (18) Months as to Count 3, Eighteen

(18) Months as to Count 4, Eighteen (18) Months as to Count 5, or until the defendant is otherwise discharged as provided by law. Sentence imposed on Counts 2, 3, 4 and 5 are to be served concurrently with each other and to the sentence imposed on Count 1.

Special Conditions of Probation.

Additional Conditions of Probation: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation: The court orders commitment to the custody of the Attorney General and recommends, Eglin Air Force Base, Florida. It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by [X] Senior U.S. District Judge

/s/ Ben Krentzman

Date June 29, 1984.

UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF FLORIDA—TAMPA

Docket No. 83-0070-Cr-T-08

United States of America vs. ANTHONY R. TANNER,

Defendant.

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, 06/29/84.

Counsel: [ ] Without Counsel. However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel. [X] With Counsel David R. Best.

Plea: [ ] Guilty, and the court being satisfied that there is a factual basis for the plea. [ ] Nolo Contendere. [X] Not Guilty.

Finding & Judgment: There being a verdict of [ ] Not Guilty, Defendant is discharged. [X] Guilty. Defendant has been convicted as charged of the offense(s) of conspiracy to defraud the United States in violation of Title 18, United States Code, Sections 371, 1341 and 1001, as charged in Counts 1, 2, 4 and 5 of the Indictment.

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) Months and fined the sum of $10,000 as to Count 1. The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged as provided by law. Eighteen (18)

months as to Count 2, Eighteen (18) months as to Count 4, Eighteen (18) months as to Count 5. Sentence imposed as to Counts 2, 4, 5 are to be served concurrently with each other and with the sentence imposed on Count 1.

Special Conditions of Probation.

Additional Conditions of Probation: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation: The court orders commitment to the custody of the Attorney General and recommends, Eglin Air Force Base, Florida. It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by [X] Senior U.S. District Judge

/s/ Ben Krentzman

Date June 29, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3431

UNITED STATES OF AMERICA

Plaintiff,

vs.

WILLIAM M. CONOVER and
ANTHONY R. TANNER,

Defendants.

DEFENDANT TANNER'S MOTION TO REMAND TO DISTRICT COURT FOR HEARING ON MOTION FOR A NEW TRIAL BASED ON JURY MISCONDUCT

Defendant Anthony R. Tanner moves the Court to temporarily relinquish jurisdiction and remand this case to the district court with instructions to conduct an evidentiary hearing concerning juror misconduct which occurred during the trial of this case. The newly discovered evidence of juror misconduct first was made known to defendant's trial counsel, David Best, on Saturday, October 13, 1984, when he received an unsolicited contact at his home in Crystal River from Juror Daniel M. Hardy, and was confirmed by Hardy's affidavit (Exhibit A) executed October 17, 1984. The evidence of misconduct is detailed in the attached affidavits of Hardy; Best (Exhibit B); and Investigator Beard (Exhibit C).* In summary these sworn affidavits demonstrate that:

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* This newly discovered evidence corroborates the statements made to Best immediately following the trial by Juror Vera Asbel (Exhibit "D").

1. Throughout the course of this six week trial numerous jurors consumed substantial amounts of alcoholic beverages on a regular basis which caused them to fall "asleep all the time during the trial" and made them incapable of being able to "review the facts" in this complex case (Exhibit A at 21-22).

2. The amounts of alcohol consumed were large in amount: Hardy observed the jury foreperson alone consume a liter of wine during the lunch recess on at least eight or nine separate instances (Exhibit A at 8); two other women jurors consumed one or two mixed drinks each day at lunch (Exhibit A at 9); the four male jurors drank approximately three pitchers of beer during the lunch recess every day during trial (Exhibit A at 6); and three of the male jurors consumed one pitcher of beer *each* just three hours prior to rendering the verdict (Exhibit C).

3. In addition, beginning the second week of trial the four male jurors began smoking marijuana during the lunch recess on a regular basis. The marijuana was supplied by one of the male jurors (identified as "John" in the affidavit), from his car in the City of Tampa parking garage and later was actually brought by the juror into the courtroom where it would be more readily accessible to the jurors. Marijuana was smoked by several of the jurors almost every day during the trial (Exhibit A at 9-15).

4. During the course of the trial one of the jurors (John) actually made a drug sale (one-quarter pound of marijuana for $250), to another juror (Pat, the carpet cleaner from Bradenton) (Exhibit A at 17, 26).

5. At least two of the male jurors, in addition to drinking beer and smoking marijuana during the course of

the trial, were also "injesting cocaine" (Exhibit A at 15-20). During the course of the trial proceedings one of the jurors offered to sell to the other jurors cocaine at the price of $80 a gram; explained to the jurors how they could "freebase" cocaine; and actually took cocaine and drug paraphernalia into the jury room, and during recesses in the proceedings would go into the juror's restroom and come back into the jury room "sniffing like he got a cold . . ." (Exhibit A at 25-26).

6. Throughout the course of the trial the jurors met during lunch and following the day's trial proceedings at the Hyatt Regency or Sheraton Hotels to discuss the trial and evidence being presented (Exhibit A at 24). [Juror Hardy stated that the jurors were aware they were acting in direct contravention of Judge Krentzman's instructions, but felt that "They can't prove nothing" (Exhibit A at 25).]

7. Juror Hardy concluded that the jury "was on one big party" (Exhibit A at 4), and that after months of struggling with his conscience he had come forward despite his fears for his job and family (Exhibit A at 29), because:

> "I felt like that the people on the jury didn't have no business being on the jury. I felt like that Mr. Tanner should have a better opportunity to get somebody that would review the facts right, that were able to review the facts" (Exhibit A at 22).

Status of Case And Procedure

This case is presently on appeal to this Court from verdicts finding defendants Tanner and Conover guilty of conspiracy and mail fraud for allegedly defrauding the Rural Electrification Administration as the result of Tan-

ner's having constructed access roads beneath transmission lines for Seminole Electric without adherence to the competitive bidding process*. While a motion for new trial was pending in the District Court one of the jurors, Vera Asbel, telephoned David Best trial attorney for defendant Tanner and informed him that several of the jurors drank alcoholic beverages during lunch; that they bragged about being on a "liquid diet"; and that several had slept through the afternoon sessions of the trial (Exhibit D). Defendant's motion for an evidentiary hearing to inquire as to these matters pursuant to the provisions of Rule 606(b), Fed.R.Evid., supported by the sworn affidavit of attorney Best concerning his conversation with Juror Asbel, was denied by Judge Krentzman without an evidentiary hearing on May 30, 1984 (Exhibit E).

The record in this case is presently being prepared by the Clerk of the District Court and has not yet been transmitted to this Court. The parties have not yet begun briefing the numerous and complex issues which are anticipated to be raised on appeal of this case.

The prior Fifth Circuit in *United States v. Fuentes-Lozano*, 580 F.2d 724 (5th Cir.1978), in order to "avoid delay", authorized the procedure by which a party whose case is pending on appeal may petition the court to temporarily relinquish jurisdiction to enable the district court to entertain a motion for new trial on the basis of newly discovered evidence (580 F.2d at 726). This procedure was recently reaffirmed by this Court in *United States v. Reek*, 725 F.2d 633 (11th Cir.1984).

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* The first trial in November and December, 1983 resulted in a mistrial when the jury was unable to reach a verdict.

Right to an Evidentiary Hearing

Evidence of outside influences on a juror during the course of a trial is deemed presumptively prejudicial and the trial court must hold a hearing to assess the evidence and the effect on the defendant's right to a fair trial. *Remmer v. United States*, 347 U.S.227, 229-30 (1954). The trial judge "must conduct a *full investigation* to ascertain whether the alleged jury misconduct actually occurred; if it occurred, he must determine whether or not it was prejudicial" *United States v. McKinney*, 429 F.2d 1019 (5th Cir.1970) (emphasis added), *cert.denied*, 401 U.S.922 (1971).

Recently in *United States v. Brantley*, 733 F.2d 1429, 1439 (11th Cir.1984), this Court held that the district court "abused its discretion" in failing to conduct a "full jury investigation;" in refusing to permit defense counsel to question the jurors concerning allegations of misconduct; and thereby "denied [defendants] the opportunity to prove their claim." *Id.* at 1439, 1440. *See also United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B 1981), *cert.denied sub nom. Myers v. United States*, 457 U.S. 1136 (1982).

Such a hearing should be a thorough and "considered review of the details and circumstances of [the] case." *United States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981), *cert.denied*, 456 U.S.962 (1982). A party claiming that the jury was improperly influenced must be given an opportunity to prove his assertion, including the chance to question the jurors. *United States v. Forrest*, 620 F.2d 446 (5th Cir.1980). While questioning jurors about their mental processes in the decision-making process is not per-

missible [Rule 606(b), Federal Rules of Evidence], the Supreme Court long ago established the rule that jurors "may testify as to any facts bearing upon the question of the existence of any extraneous influence . . . ." They may be questioned regarding "acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial." *Mattox v. United States*, 146 U.S.140, 13 S.Ct.50, 51 (1892). *See also Faith v. Neely*, 41 F.R.D.361 (N.D.W.Va.1966) (in certain instances, such as where defendant had secured an affidavit from juror alleging jury misconduct, "there is strong legal precedent for the court interrogating a jury to determine if improper conduct has contaminated its verdict"). Weinstein states:

> "Because of the general provision in Rule 601 that all witnesses are competent except as otherwise provided, evidence of jury conduct is admissible and a juror may testify to it except as prohibited by subdivision (b) of Rule 606. Rule 606(b) *would not render a witness incompetent to testify to juror irregularities such as intoxication*, . . . regardless of whether the jury misconduct occurred within or without the jury room." 3 J Weinstein and M. Berger, Weinstein's Evidence ¶ 606[04] at 606-29 through 606-32 (1982) (emphasis added).

The right to a trial before an impartial and competent jury is a fundamental right guaranteed by the Sixth Amendment. The Supreme Court has long been rigid in its enforcement of this guarantee, adhering to the principle that failure to provide a fair hearing by a panel of impartial jurors violates even the minimal standards of due process. *Irvin v. Dowd*, 366 U.S.717, 722 (1961). The "'[e]xercise of calm and informed judgment by [jury] members is essential to proper enforcement of law.'" *Turner v. Louisiana*, 379 U.S.466, 472 (1965).

The newly discovered evidence in the form of Juror Hardy's sworn statement clearly shows that the jury in this trial was unable to exercise informed judgment because of the excessive abuse of intoxicants and narcotics by the jurors. The jurors were often in no condition to hear and evaluate testimony, and on many occasions they simply did not hear testimony because they were asleep. Juror Asbel's prior sworn statement corroborates Hardy's statement in this respect. One of the jurors described his own condition as "flying", which Hardy interpreted as being "messed up." Hardy further notes that the juror "stuttered a bit" and was "falling asleep all the time during the trial" (Exhibit A at 21). In such a condition it is apparent that these jurors' ability to review the facts and reason clearly was substantially impaired (Exhibit A at 29).

It is well-settled that where the jury is subjected to improper outside influences which might affect the consideration of the case, a presumption of prejudice arises which places a heavy burden on the government to show that the defendant was not deprived of a fair trial as a result. *Remmer v. United States*, 347 U.S.227, 229 (1954); *United States v. Chiantese*, 582 F.2d 974, 979 (5th Cir. 1978); *Baker v. Hudspeth*, 129 F.2d 779, 782 (10th Cir. 1942). The jury's verdict should be the result of careful consideration solely of evidence produced in court. The jury in this case was neither careful nor free from outside influences. Indeed, the new evidence shows that some jury members were controlled by outside influences and were

unable to consider the evidence at all because they were intoxicated and slept through afternoon testimony. Defendant Tanner acknowledges that mere use of intoxicants by jury members is not sufficient reason to require a new trial. The defendant must "show he was prejudiced—i.e., that a juror became intoxicated so that he or she was affected in the performance of his or her duties." *United States v. Taliaferro*, 558 F.2d 724, 726 (4th Cir.1977), *cert.denied*, 434 U.S.1016 (1978). But where such an effect is shown, a verdict should be set aside. *Jorgensen v. York Ice Machinery Corp.*, 160 F.2d 432 (2d Cir.1947), *cert.denied*, 332 U.S.764 (1947); *Faith v. Neely*, 41 F.R.D. 361 (N.D.W.Va.1966). The new evidence from Juror Hardy, corroborated by the statement from Juror Asbel, shows without a doubt that the jurors were unable to perform their function properly.

It is not surprising that there does not appear to be a reported case involving facts such as those presented by the affidavits in this case. Indeed, it is difficult to fathom a more extreme and egregious case of juror misconduct. For, not only were many of the jurors apparently unable to comprehend the proceedings because of having taken excessive alcohol and drugs, but criminal violations, including the use and sale of narcotics, were actually taking place among jurors while serving in a federal criminal case. The right guaranteed by the Sixth Amendment to a trial by "an impartial jury" certainly envisions, at the very least, trial by a jury whose mental facilities are not impaired by the excessive use of intoxicants and drugs during the trial and the deliberations.

For the foregoing reasons, defendant respectfully requests an Order remanding this case with instructions that

the District Court conduct an evidentiary hearing concerning the evidence of juror misconduct, such hearing to include the examination of jurors by counsel for defendant Tanner, and following such hearing to grant such relief as the District Court may deem appropriate.

Respectfully submitted,

/s/ John A. DeVault, III
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Attorney for Defendant-Appellant
Anthony R. Tanner

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA

v. Case No. 84-3431

WILLIAM CONOVER
ANTHONY TANNER

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO REMAND

Comes now, the United States of America, by and through its Assistant United States Attorney, and files its Response to Defendant's Motion to Remand to District Court for Hearing on Motion for New Trial and asks that this Honorable Court deny said motion. Defendant Tanner in his Motion to Remand alleges jury misconduct as his grounds to remand the instant case back to the District Court. The defendant has attached affidavits to his motion in support thereof. Apparently, in direct violation of an order (Exhibit A) entered by His Honor Judge Krentzman, defense counsel has had a private investigator interview and take a sworn statement from juror Daniel Hardy who makes various criminal allegations against other members of the jury. These affidavits should not be considered by this Court or any court as they are specifically precluded under Rule 606(b) of the Federal Rules of Evidence.

Defendant Tanner has previously attempted to have the trial court set aside the guilty verdicts by alleging jury misconduct. Judge Krentzman conducted a hearing on the allegations of alcohol abuse by members of the jury and

denied the motions and denied the defendant's request to interview jurors. (See Exhibit B). Judge Krentzman found that the allegations of alcohol abuse by the jurors did not "prove that extraneous prejudicial information was improperly brought to the jurors' attention or that any outside influence was improperly brought to bear upon any juror," as contemplated by Rule 606(b), Federal Rules of Evidence. The defendant's most recent attack does nothing more than include the ingestion or inhalation of drugs with the ingestion of alcohol. The thrust of his recent motion is identical to the issue which has already been ruled on by Judge Krentzman.

The law is clear that even if this Honorable Court did remand this case back to the District Court, which the Government contends it should not do, the results would be the same as the first hearing, since there is nothing to show that there was any extraneous prejudicial information or any outside influence brought to bear on any juror.

As a general rule, a jury's verdict is not subject to attack unless it can be shown by competent evidence that it was coerced by some improper outside influence. *Jenkins v. United States*, 380 U.S. 445, 446 (1965); *United States v. Badolato*, 710 F.2d 1509, 1515 (11th Cir. 1983). Furthermore, a juror generally cannot impeach his own verdict. *United States v. Weiner*, 578 F.2d 757, 764 (9th Cir. 1978), citing *McDonald v. Pless*, 238 U.S. 264 (1915). Biases and prejudices of jurors, secret motives or beliefs of jurors and matters occurring during deliberations, including pressure exerted by one juror over another cannot be questioned after the verdict. *See, e.g., United States*

v. Bagnariol, 665 F.2d 877, 884 (9th Cir. 1981); *United States v. Hockridge*, 573 F.2d 752 (2d Cir. 1978).

Inquiry into the validity of a verdict is governed by Rule 606(b) of the Federal Rules of Evidence, which provides:

> (b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Rule 606(b) itself allows only two areas of inquiry. Those areas are: (1) extraneous prejudicial information improperly being brought to the jury's attention; or (2) outside influence improperly being brought to bear upon any juror. The question in this case is whether the contentions raised by the defendant are cognizable under Rule 606(b), and the government submits that they are not. Judge Krentzman has previously ruled that alcohol consumption did not fall into the two areas of inquiry and it is submitted that the ingestion of a drug would likewise not be an extraneous influence.

As previously stated, the Government contends that the affidavits accompanying the defendant's motion should

be precluded from consideration pursuant to Rule 606(b), Federal Rules of Evidence. If this Court chooses to read the affidavits, they fail to reveal that any prejudice or improper outside influence was brought to bear on the jury. The affidavit does not contain any allegations by the juror that any juror was intoxicated, through the use of alcohol or drugs, to the extent that they were unqualified to serve as a juror. Mr. Hardy states that on *one* day his reasoning ability was affected. The trial lasted over four weeks, and that one day was not during the deliberation of the jury. It does not contain an allegation that any of the jurors were incapable of hearing or understanding the evidence or conducting deliberations. A conclusory allegation that the defendants must have been deprived of a fair trial because of the matters contained in Mr. Hardy's comments must be dismissed as legally insufficient.

Assuming that a juror was intoxicated or ingesting drugs, it does not follow that defendants were prejudiced by that fact. There is no necessary connection between use of alcoholic beverages or drugs and a desire to convict. There is further no connection between use of alcoholic beverages and drugs and use of intimidating tactics during deliberations. These factors are all part of the subjective deliberative process and cannot be questioned.

The record of the trial also tends to refute the contentions in the motion and affidavit. These are the facts:

(1) It was never brought to the Court's attention that any juror was misusing alcohol or drugs;

(2) It was never brought to the Court's attention by any of the defense counsel that any juror appeared not to be paying attention or was otherwise incapacitated;

(3) The Court's instructions were not coercive;

(4) The jury never indicated that it was having difficulty reaching a verdict or that it was deadlocked; and

(5) The jury acquitted defendant Tanner on one count;

(6) The jury was polled *after* the verdict and each and every juror affirmed the verdict. (Exhibit C).

Based on all these uncontestable facts, there can be no doubt that the motion is frivolous. Assuming defendant's contentions are true, there is no basis for granting a motion to set aside the verdict, to interview other jurors or to conduct an evidentiary hearing. There is nothing in the affidavit which requires an evidentiary hearing. There is no need to inquire of the jurors the *affect* of the alleged "outside influence" because no "outside influence" has really been alleged. The motion is nothing more than a clever attempt to set aside a guilty verdict through incompetent and insufficient evidence.

WHEREFORE, the United States of America requests this Honorable Court to deny defendant's Motion to Remand. Defense counsel have not asserted any new grounds contemplated in Rule 606(b) which would allow inquiry into the validity of the jury's verdict. The sanctity of the jury process should be carefully guarded as well as

the finality of its verdict. Accordingly, the Motion to Remand should be denied.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3431

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM M. CONOVER and ANTHONY R. TANNER,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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(Filed November 13, 1984)

Before RONEY, FAY and JOHNSON, Circuit Judges.

BY THE COURT:

Appellants' motion to remand this appeal to the United States District Court for the Middle District of Florida is denied; without prejudice to the movant to follow the preferred procedure outlined in U.S. v. Fuentes-Loyano, 580 F. 2d 724 (5th Cir. 1978) and approved in U. S. v. Reeb, 725 F. 2d 633 (11th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 83-70 Cr-T-8

WILLIAM M. CONOVER, and
ANTHONY R. TANNER,

Defendants.

DEFENDANT TANNER'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE OF JURY MISCONDUCT

Defendant Anthony R. Tanner, pursuant to Rule 33, Federal Rules of Criminal Procedure, moves this Court:

1) To conduct an evidentiary hearing during which counsel is afforded the opportunity to interrogate the trial jurors to determine whether jury misconduct occurred, and whether it was prejudicial.

2) Following such hearing, to certify to the Court of Appeals that it is disposed to grant a new trial upon remand of the case in accordance with the procedure approved in *United States v. Reeb*, 725 F.2d 633 (11th Cir.1984); and *United States v. Fuentes-Lozano*, 580 F.2d 724, 725-26 (5th Cir. 1978).

3) Upon remand, to grant defendant a new trial and such other and further relief as this Court deems appropriate.

The facts upon which this motion is based were first made known to defendant Tanner's trial attorney, David R. Best, on Saturday, October 13, 1984, when he received an unsolicited visit at his home in Crystal River from Juror Daniel M. Hardy. Those facts are detailed in the attached affidavits of Juror Daniel M. Hardy (Exhibit "A" 10/17/84); Attorney David R. Best (Exhibit "B" 10/17/84); Investigator O. Douglas Beard (Exhibit "C" 10/17/84) and Attorney David R. Best (Exhibit "D" 4/19/84). The legal authority in support of the motion is set forth in the memorandum of law filed herewith.

Respectfully submitted,

BEDELL, DITTMAR, DeVAULT,
PILLANS & GENTRY
Professional Association

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Attorney for Defendant-Appellant
Anthony R. Tanner

[Certificate of Service omitted in printing.]

EXHIBIT A
SWORN STATEMENT
DANIEL MARTIN HARDY

PERSON INTERVIEWED: Daniel Martin Hardy.

DATE OF INTERVIEW: October 15, 1984.

PLACE OF INTERVIEW: Holiday Inn, Interstate 4, Plant City, Florida.

PERSONS PRESENT: Daniel Martin Hardy, O. Douglas Beard, Investigative Research, Inc., and Walter E. Taylor, Investigative Research, Inc.

INTERVIEWED BY: O. Douglas Beard, Investigative Research, Inc.

Mr. Beard: Mr. Hardy, I have explained to you that I am a private investigator. I've also explained to you that Mr. Taylor is a private investigator. I believe that you know my face from having seen me during the trial of Anthony Tanner that took place in Tampa, Florida, during February and March, 1984. Do you recognize my face, do you know who I am?

Mr. Hardy: Yes.

Mr. Beard: I'm sorry?

Mr. Hardy: Yes.

Mr. Beard: All right, Mr. Hardy, thank you, I appreciate your picking up your voice as much as you can so it can be clearly understood. Mr. Hardy, I've explained to you today that I am here at the request of Attorney David Best,

(p. 2) Statement: Hardy

who was Mr. Tanner's defense counsel. Do you understand that?

Mr. Hardy: Yes.

Mr. Beard: I have also explained to you that our conversation is being tape recorded at this moment. Do you understand that?

Mr. Hardy: Yes.

Mr. Beard: Do I have your permission to record our conversation?

Mr. Hardy: Yes.

Mr. Beard: All right. Mr. Hardy, I am a Notary Public in the State of Florida. Do you know what a Notary Public is?

Mr. Hardy: Yes.

Mr. Beard: Essentially, a Notary Public is empowered to swear individuals to their statements. Do you understand that?

Mr. Hardy: Yes.

Mr. Beard: Would you raise your right hand for me please, Mr. Hardy. Knowing that I am a Notary Public, do you swear to tell the truth and nothing but the truth?

Mr. Hardy: Yes.

Mr. Beard: All right. Mr. Hardy, I'd like to talk to you first about your most recent meeting with David Best in Crystal River, Florida. Do you recall such a meeting?

Mr. Hardy: Yes.

Mr. Beard: How did the meeting come about?

Mr. Hardy: I seen Mr. Best on the side of the road.

Mr. Beard: All right, can you be a little bit more specific? Did you just happen to be in Crystal River?

(p. 3) Statement: Hardy

Mr. Hardy: Right.

Mr. Beard: All right. Were you there alone?

Mr. Hardy: No.

Mr. Beard: Who was with you?

Mr. Hardy: My wife and son.

Mr. Beard: Did you go to Crystal River to see David Best?

Mr. Hardy: No.

Mr. Beard: Do I understand you correctly that your seeing David Best initially was pure circumstance?

Mr. Hardy: Right.

Mr. Beard: You did not have an appointment?

Mr. Hardy: No.

Mr. Beard: Once you saw Mr. Best in Crystal River, did you make any attempts to personally speak with him?

Mr. Hardy: Yes.

Mr. Beard: When did the meeting occur?

Mr. Hardy: Saturday.

Mr. Beard: Are we talking about this past Saturday?

Mr. Hardy: Right.

Mr. Beard: So, it would have been two days ago, it would have been October the 13th, is that correct?

Mr. Hardy: Right.

Mr. Beard: Where did you talk with Mr. Best?

Mr. Hardy: In one of his homes.

Mr. Beard: Was this in Crystal River?

Mr. Hardy: Right.

Mr. Beard: What did you tell Mr. Best?

Mr. Hardy: I told Mr. Best that I had some things on my mind that had been bothering me a long time and I wanted to clear my conscience.

Mr. Beard: All right. What was David Best's reaction.

Mr. Hardy: He asked me if I wanted to come in the house.

Mr. Beard: Did you go in?

Mr. Hardy: Yes. Reluctantly, but I did.

Mr. Beard: Did you go in voluntarily?

Mr. Hardy: Right.

Mr. Beard: All right. What did you tell Mr. Best?

Mr. Hardy: I told Mr. Best that I felt like that the trial, the jury didn't, I told him a lot of things, but the main thing I . . .

Mr. Beard: Well, let's just, let's start kind of one thing at a time, if we can. Did you discuss with Mr. Best any specific thing relative to jury conduct that concerned you?

Mr. Hardy: Right. Yes.

Mr. Beard: What did you talk about, with regard to jury conduct?

Mr. Hardy: I told him that I felt like that the jury was on one big party.

Mr. Beard: All right. Mr. Hardy, let's back up just a moment. Were you a juror in the Anthony Tanner trial that took place in February and March, 1984?

Mr. Hardy: Yes.

Mr. Beard: Were you one of the jurors who ultimately rendered a verdict?

Mr. Hardy: Yes.

(p. 5) Statement: Hardy

Mr. Beard: All right. Now, you told Mr. Best that you felt the jury was on one big party, is that correct?

Mr. Hardy: Right.

Mr. Beard: Why did you feel that way?

Mr. Hardy: Because the actions that were being conducted by the jurors.

Mr. Beard: All right. Specifically, with regard to the jurors, what do you mean?

Mr. Hardy: Well, we all just, we used to go out to lunch and drink alcohol.

Mr. Beard: All right, now you're talking about the regular noon recess during the trial?

Mr. Hardy: Right.

Mr. Beard: When you say we, let's be more specific. Who do you recall drinking alcohol during lunch?

Mr. Hardy: Three, the three other male jurors and three of the women.

Mr. Beard: All right, Mr. Hardy, is it your recollection that there were four male jurors, including yourself?

Mr. Hardy: Right.

Mr. Beard: Would you please describe for me, the other three male jurors, either by name or physical description.

Mr. Hardy: One of them was a transmission mechanic in St. Petersburg, I believe his name was John.

Mr. Beard: What did he look like?

Mr. Hardy: He was a relatively younger individual, as myself.

Mr. Beard: Did he have blond hair?

Mr. Hardy: Long, straight blond hair.

(p. 6) Statement: Hardy

Mr. Beard: All right, go ahead.

Mr. Hardy: And the other one was Craig, which worked for GTE, he lived in Largo, and another guy, which owned a carpet cleaning business out of Bradenton, Florida.

Mr. Beard: Do you recall his name?

Mr. Hardy: No, I don't.

Mr. Beard: Do you recall what he physically looked like?

Mr. Hardy: Yes, I do.

Mr. Beard: Would you please describe him?

Mr. Hardy: He was about five foot seven, had black, about a hundred and eighty, sixty, seventy pounds, had black, grayish, curly hair.

Mr. Beard: All right. Now, I want to make sure I understand you correctly. Are you telling me that you,

John, Craig, and the carpet cleaner all consumed alcohol during the noon recess while the trial was going on?

Mr. Hardy: Yes.

Mr. Beard: All right. Now, how much alcohol are we talking about, Mr. Hardy?

Mr. Hardy: Anywhere from a pitcher to three pitchers, depending upon how we felt.

Mr. Beard: Three pitchers of what?

Mr. Hardy: Budweiser.

Mr. Beard: Did you all drink Budweiser?

Mr. Hardy: Yes.

Mr. Beard: Did you participate equally with regard to your drinking? Did all four of you drink the beer?

Mr. Hardy: Yeah, but we didn't participate equally, I think we didn't consume the same amount, some consumed more.

(p. 7) Statement: Hardy

Mr. Beard: Who were the heavier drinkers in the group?

Mr. Hardy: The guy that owned the carpet cleaning store, and John, the guy that was a transmission mechanic that lived in St. Petersburg.

Mr. Beard: All right, it was your impression that the carpet cleaner and John from St. Petersburg consumed more than you and Craig?

Mr. Hardy: Right.

Mr. Beard: All right. Now, you mentioned earlier that there were three female jurors who also drank. Would you please describe for me who these three women were?

Mr. Hardy: Well, two of them I would have to see their face again to (UNINTELLIGBLE), it's been a long time. But one specifically, because I felt like to me as much as she consumed all the time, she had to be an alcoholic.

Mr. Beard: All right. Would you describe for me this lady who you would consider to be an alcoholic?

Mr. Hardy: About five foot two and two hundred pounds.

Mr. Beard: Did she, was she on the jury from the beginning?

Mr. Hardy: Yes.

Mr. Beard: Was she an alternate?

Mr. Hardy: Yes.

Mr. Beard: Did she ultimately get on the jury?

Mr. Hardy: Yes.

Mr. Beard: When did this happen?

(p. 8) Statement: Hardy

Mr. Hardy: When Craig asked to be dismissed for vacation purposes.

Mr. Beard: All right. Who was the foreman of the jury?

Mr. Hardy: She was.

Mr. Beard: All right. When you say she, you mean the lady that you've just described who consumed a lot of alcohol?

Mr. Hardy: Yes.

Mr. Beard: All right. Now, Mr. Hardy, when we're talking about, or when you are talking about a quantity of alcohol, how much do you mean?

Mr. Hardy: A liter.

Mr. Beard: A liter of what?

Mr. Hardy: Wine.

Mr. Beard: How often did you go to lunch with the lady who ultimately ended up as the foreman of the jury?

Mr. Hardy: Three times.

Mr. Beard: Did you see her drink on each of those occasions?

Mr. Hardy: Yes, I did.

Mr. Beard: Did she drink the same amount on each occasion?

Mr. Hardy: Yes, she did. One time we seen them, we wasn't with them, we was in the same place, but we were at different tables, on about five or six other occasions.

Mr. Beard: All right. On each occasion that you accompanied this lady and on each occasion that you observed her, was she drinking wine?

Mr. Hardy: Yes.

Mr. Beard: Did she order the same quantity?

(p. 9) Statement: Hardy

Mr. Hardy: Yes.

Mr. Beard: Was it a liter?

Mr. Hardy: Yes.

Mr. Beard: Did you observe her drink the liter?

Mr. Hardy: Yes. Mostly the two other women were given a mixed drink, maybe one or two a piece.

Mr. Beard: All right.

Mr. Hardy: I never seen more than two though.

Mr. Beard: Okay. Dan, have you had any contact with Anthony Tanner since the trial?

Mr. Hardy: No. I never had no contact with Anthony Tanner.

Mr. Beard: Have you had any contact with David Best, other than this Saturday meeting that you initiated?

Mr. Hardy: No.

Mr. Beard: Has anyone encouraged you to meet with Mr. Best?

Mr. Hardy: No.

Mr. Beard: All right. Mr. Hardy, I want to talk to you now about something we just discussed previously with regard to John, the young transmission mechanic who was a member of the jury. During the course of the trial, did you become aware that John was smoking marijuana?

Mr. Hardy: Yes, I did.

Mr. Beard: How did you become aware of that?

Mr. Hardy: When we went to lunch or after the trial we would sit around and talk and he would ask us did we want to smoke, burn one with him, smoke one with him.

(p. 10) Statement: Hardy

Mr. Beard: All right. Now, let me stop for just a minute. When you say we, who are you talking about?

Mr. Hardy: All of the four male jurors.

Mr. Beard: Okay, and now we're talking specifically about John, do I understand you correctly that John offered you marijuana?

Mr. Hardy: Yes.

Mr. Beard: Did he offer Craig and the carpet cleaner marijuana?

Mr. Hardy: Yes, he did.

Mr. Beard: Did any of you either singly or together during the trial, smoke marijuana?

Mr. Hardy: They did. I did on one occasion.

Mr. Beard: All right. Now, when you say they, Mr. Hardy, are you talking about . . .

Mr. Hardy: The four male, the three other male jurors.

Mr. Beard: All right. Did you see the marijuana being smoked?

Mr. Hardy: Yes, I did.

Mr. Beard: Where did this happen? And let's talk about each separate instance separately, when is the first

time during the trial that marijuana was made available to you by John?

Mr. Hardy: About the second week.

Mr. Beard: And how did it occur?

Mr. Hardy: We was at lunch talking, and just one thing led to another.

Mr. Beard: What did John say?

Mr. Hardy: He asked us did we party very much.

Mr. Beard: And what happened as a result of that?

(p. 11) Statement: Hardy

Mr. Hardy: Everybody said yeah. And he asked us did we want to go burn one with him.

Mr. Beard: This was the second week of the trial?

Mr. Hardy: Right.

Mr. Beard: Do you recall where you were when this conversation took place?

Mr. Hardy: Yes.

Mr. Beard: Where?

Mr. Hardy: Franklin Mall, Franklin Street mall.

Mr. Beard: Specifically, what store?

Mr. Hardy: Well, I don't know what store, but we was standing out beside some sandwich shop, Fish and Chips, whatever, I can't specifically think of the name, but I know the place was we went there and went and got us, we went through and got Arthur Treacher's, I think that's what it is, Fish and Chips.

Mr. Beard: So, it was that location that John first mentioned the availability of marijuana?

Mr. Hardy: Right.

Mr. Beard: Did he have marijuana with him that day to offer?

Mr. Hardy: Yes.

Mr. Beard: Where did you go to smoke it?

Mr. Hardy: To the parking garage.

Mr. Beard: What parking garage are you talking about?

Mr. Hardy: The City of Tampa.

Mr. Beard: Where is that located?

Mr. Hardy: Twigg Street.

(p. 12) Statement: Hardy

Mr. Beard: What street?

Mr. Hardy: Twigg.

Mr. Beard: Twigg Street? Mr. Hardy, how did you happen to select that parking garage?

Mr. Hardy: We had to park there.

Mr. Beard: All right. This is where your cars were parked?

Mr. Hardy: Right.

Mr. Beard: Did John have to go to his car to get the marijuana?

Mr. Hardy: At first.

Mr. Beard: All right. Did you all four participate on that day?

Mr. Hardy: No.

Mr. Beard: All right. That was the first time, right?

Mr. Hardy: Right.

Mr. Beard: Who did participate?

Mr. Hardy: John and the guy from Bradenton.

Mr. Beard: All right, John and the guy from Bradenton? Can you be more specific about the guy from Bradenton? Who is that?

Mr. Hardy: He owned the carpet cleaning store, the carpet cleaning business.

Mr. Beard: All right. Did John give the juror from Bradenton and Craig the marijuana?

Mr. Hardy: Craig didn't smoke none the first time.

Mr. Beard: All right, it was just John and the man from Bradenton?

Mr. Hardy: Right.

Mr. Beard: Was the marijuana free or did you have to pay for it?

(p. 13) Statement: Hardy

Mr. Hardy: It was free.

Mr. Beard: All right. How much marijuana was consumed on that first occasion?

Mr. Hardy: One cigarette.

Mr. Beard: And what happened after that was finished?

Mr. Hardy: We went back to the courthouse.

Mr. Beard: All right. Was that marijuana consumed after the four of you had been drinking beer?

Mr. Hardy: Yes, it was.

Mr. Beard: Okay. Mr. Hardy . . .

Mr. Hardy: No, it wasn't, I'm sorry, we didn't drink none that day. I'm sorry, we didn't, we didn't drink none that day. We didn't have time.

Mr. Beard: Okay. All right. When is the second time that you can recall marijuana being offered?

Mr. Hardy: The next day.

Mr. Beard: Who offered marijuana?

Mr. Hardy: John.

Mr. Beard: How did it, how did the subject come up?

Mr. Hardy: He asked me did we want to go to smoke one with him again while we were at the Hyatt Regency Hotel.

Mr. Beard: Was this during lunch?

Mr. Hardy: Right.

Mr. Beard: Had you consumed any alcohol at the Hyatt Regency?

Mr. Hardy: Yes, we had.

Mr. Beard: How much?

Mr. Hardy: One pitcher.

(p. 14) Statement: Hardy

Mr. Beard: One pitcher between the four of you?

Mr. Hardy: Four of us, yes.

Mr. Beard: All right. Did you or any of the group then go and smoke marijuana?

Mr. Hardy: Yes, we all did.

Mr. Beard: All right, where did you go?

Mr. Hardy: To the parking garage.

Mr. Beard: Did John have the marijuana in his car?

Mr. Hardy: Yes.

Mr. Beard: Did he offer it free?

Mr. Hardy: Yes, he did.

Mr. Beard: How much marijuana was consumed?

Mr. Hardy: One cigarette.

Mr. Beard: Where did you go after you finished?

Mr. Hardy: Back to the courthouse.

Mr. Beard: When is the third time that you can recall marijuana being offered?

Mr. Hardy: The next day. This was a frequent occasion.

Mr. Beard: All right. This was a frequent occasion? Okay, to avoid repeating this, Mr. Hardy, did John always keep the marijuana in his car?

Mr. Hardy: The first week he did, then he started taking it with him 'cause we didn't want to have to walk to the parking garage anymore.

Mr. Beard: So, Mr. Hardy had the marijuana with him in the courtroom?

Mr. Hardy: Right.

(p. 15) Statement: Hardy

Mr. Beard: Where did the four of you go to smoke marijuana after that?

Mr. Hardy: Down past the Hyatt Regency.

Mr. Beard: Specifically, where?

Mr. Hardy: I don't know the road, it was past the hotel on the other side.

Mr. Beard: Was it a quiet place?

Mr. Hardy: Yeah, away from everybody.

Mr. Beard: Mr. Hardy, how often did this occur during the course of the trial, with regard to smoking marijuana?

Mr. Hardy: Just about every day except on maybe three or four occasions, five or six occasions, maybe, I would say when me and Craig didn't go with them.

Mr. Beard: All right, so, this began during the second week of trial, went through the entire trial, is that correct?

Mr. Hardy: Right.

Mr. Beard: With the exception of five or six occasions when you and Craig did not participate?

Mr. Hardy: Right, we were scared.

Mr. Beard: You were scared?

Mr. Hardy: Right.

Mr. Beard: Okay. Mr. Hardy, did there come a time during your association with the juror who we've identified as John, that you became aware that John was ingesting cocaine during the noon hour?

Mr. Hardy: Yes.

Mr. Beard: Would you tell me about that please, sir?

(p. 16) Statement: Hardy

Mr. Hardy: Well, he asked us did we want any toot.

Mr. Beard: Did you want any toot?

Mr. Hardy: Right. When we found that out we didn't have too much to do with him no more.

Mr. Beard: All right. Mr. Hardy, did you at any time, see John injest cocaine?

Mr. Hardy: Yes, sir.

Mr. Beard: Would you explain that to me, when it occurred and where it occurred?

Mr. Hardy: At lunch, at the parking garage, in his car.

Mr. Beard: All right. Was there anyone present besides you and John?

Mr. Hardy: Yes. All three of the other, all four male jurors were there.

Mr. Beard: How much cocaine was injested by John?

Mr. Hardy: A pretty good bit, I would say. Of course I don't know too much about it.

Mr. Beard: Did John offer cocaine to any of the rest of you?

Mr. Hardy: Yeah, all of us.

Mr. Beard: Did anyone else participate?

Mr. Hardy: Yes, the guy from Bradenton that owned the carpet cleaning business.

Mr. Beard: Did John offer cocaine free of charge or was he selling it?

Mr. Hardy: Both.

Mr. Beard: Can you be more specific with me?

Mr. Hardy: Well, he offered it free of charge, he offered it to us free (p. 17) Statement: Hardy of charge on the occasions when we were there, then he wanted to know did we want to buy any of it, plus he wanted to know did we want any marijuana too, and some did, was sold, I never seen it. but I heard him talk about it.

Mr. Beard: You heard who talking about it?

Mr. Hardy: John and the guy from the carpet cleaning store, he wanted to know if he wanted to buy a quarter pound.

Mr. Beard: To your knowledge . . .

Mr. Hardy: No, the guy asked him did he have, did he know where he could get a quarter of a pound.

Mr. Beard: Who is the guy?

Mr. Hardy: The guy from the carpet cleaning store in Bradenton, the carpet cleaning business.

Mr. Beard: All right. Do I understand you correctly that the juror from Bradenton, who owned the carpet cleaning business, inquired of John, also another juror, as to where he. meaning the carpet cleaner, could buy marijuana?

Mr. Hardy: Right.

Mr. Beard: And what did John tell him?

Mr. Hardy: He had it.

Mr. Beard: Did John tell the carpet cleaner that he would sell him marijuana?

Mr. Hardy: Yes, he did.

Mr. Beard: All right. How much did you observe the carpet cleaner injest, with regard to the cocaine?

Mr. Hardy: I would say a couple lines.

Mr. Beard: A couple of lines? What do you mean by a line, Mr. Hardy?

(p. 18) Statement: Hardy

Mr. Hardy: Well, they would get a razor blade and chop it up and then make lines out of it.

Mr. Beard: Can you explain to me physically what we're talking about? When you say they, do you mean John and the carpet cleaner?

Mr. Hardy: John and the carpet cleaner.

Mr. Beard: Where was this done?

Mr. Hardy: In the parking garage.

Mr. Beard: Was it done in the car?

Mr. Hardy: Right.

Mr. Beard: What kind of a car does John drive?

Mr. Hardy: He drives a Gremlin.

Mr. Beard: What color is it?

Mr. Hardy: Brown.

Mr. Beard: Where did he keep the narcotics?

Mr. Hardy: In his glove compartment.

Mr. Beard: How were the narcotics packaged and when we're talking about packaging, talk first about the marijuana, second about the cocaine. How was the marijuana packaged?

Mr. Hardy: It was in a, he kept it like, I would say a prescription bottle.

Mr. Beard: Was there a lot of marijuana?

Mr. Hardy: Just four or five things, maybe, he got four or five cigarettes out of it.

Mr. Beard: All right. With regard to the cocaine, how was that packaged?

Mr. Hardy: Well. he had it in a bag, you know, in a couple of thin, then later on he would bring a contraption that he had, I guess

(p. 19) Statement: Hardy

his wife called it, it had a bottle that you would screw onto the top of it and he would turn a handle on it down, and

turn it upside down and that would fill up, would fill up, I don't know how to say it, it would fill up a compartment in it, then he would turn it up and then he would stick it up to his nose and suck on it or hit it, or whatever, up his nose.

Mr. Beard: Did you see John physically perform that function on any occasion?

Mr. Hardy: Yes, I did.

Mr. Beard: How many times?

Mr. Hardy: I'd say about five.

Mr. Beard: How many of those five times occurred during the Anthony Tanner trial?

Mr. Hardy: All of them. The only time I'm talking about is when it occurred on the Anthony Tanner trial at lunch time. It was done too, after the trial was over.

Mr. Beard: All right, for right now, let's stick specifically to the lunch hour. Did you ever become aware that the carpet cleaner from Bradenton was participating in the cocaine injestion as well?

Mr. Hardy: Yes.

Mr. Beard: How often did you see that carpet cleaner injest cocaine?

Mr. Hardy: Two or three times.

Mr. Beard: Where did the injestion take place?

Mr. Hardy: At the garage, parking garage.

Mr. Beard: All right, Mr. Hardy, explain to me if you would, what happened once John took the cocaine out

of the glove compartment. Where did he put it and how did he cut it?

(p. 20) Statement: Hardy

Mr. Hardy: He put it on a mirror and took a razor blade and chopped it up.

Mr. Beard: Where did he get the mirror?

Mr. Hardy: Out of his glove compartment.

Mr. Beard: Did he do it inside of the car or outside?

Mr. Hardy: Inside.

Mr. Beard: Did he divide the cocaine equally?

Mr. Hardy: No. He did more than what the guy from the carpet cleaning business did.

Mr. Beard: All right. Mr. Hardy, was there ever an occasion that the carpet cleaner from Bradenton and John, the young man on the jury, injested cocaine after the four of you had been consuming alcohol?

Mr. Hardy: Yes.

Mr. Beard: Was it frequent or infrequent?

Mr. Hardy: It was frequent, most of the time we went to lunch and ate and got us a beer and then we left to go to the parking garage.

Mr. Beard: All right. When you say ate and got us a beer, are you talking about one beer or pitchers of beer?

Mr. Hardy: Pitchers of beer.

Mr. Beard: So, after you consumed the pitchers of beer, John and, on occasion, the carpet cleaner member of the jury, injested cocaine, is that correct?

Mr. Hardy: That's right.

Mr. Beard: Were there occasions when all three things were done? Alcohol, marijuana, and cocaine?

Mr. Hardy: Yes, there was.

(p. 21) Statement: Hardy

Mr. Beard: Mr. Hardy, were you able to discern a change of attitude, a change in physical alertness, or anything along those lines, with regard to John, the young man on the jury, after he drank and injested either marijuana or cocaine?

Mr. Hardy: Yeah, John just talked about how he was flying.

Mr. Beard: All right. What did he mean by that, in your opinion?

Mr. Hardy: Flying? I guess he was messed up.

Mr. Beard: Did John show any physical signs that were obvious to you?

Mr. Hardy: To me, yes, maybe not to a normal person.

Mr. Beard: Wht kind of signs?

Mr. Hardy: Well, he just, he'd stutter a little bit, you know, I know that they was falling asleep all the time during the trial.

Mr. Beard: When you say they, who are you talking about?

Mr. Hardy: Most, some of the jurors. Like John and the guy from the carpet cleaning store.

Mr. Beard: All right. Mr. Hardy, to your knowledge, did Craig ever take part in the cocaine injestion?

Mr. Hardy: No, he didn't

Mr. Beard: Did you?

Mr. Hardy: No, I didn't. We didn't want to let them find out that, we didn't really, once we seen that, we didn't really want to get involved in that. Like I said, we were scared, we were scared that we was going to get in trouble and we really didn't want to have too much more to do with it after that. This went on about through the middle of the trial.

(p. 22) Statement: Hardy

Mr. Beard: All right. Mr. Hardy, have you had any contact with any of the prosecutors since the verdict was rendered.

Mr. Hardy: Yes, I have.

Mr. Beard: Who initiated that contact?

Mr. Hardy: I, myself.

Mr. Beard: Who did you call?

Mr. Hardy: Mr. Runyon.

Mr. Beard: And what did you talk about?

Mr. Hardy: We talked about the alcohol consumption.

Mr. Beard: What did you tell Mr. Runyon?

Mr. Hardy: I told Mr. Runyon that we would just go out and get us a pitcher of beer and drink it, but as far as us being drunk, no we wasn't.

Mr. Beard: Did you tell Mr. Runyon about the marijuana?

Mr. Hardy: No, I didn't.

Mr. Beard: Did you tell Mr. Runyon about the cocaine?

Mr. Hardy: No, I didn't.

Mr. Beard: Mr. Hardy, you have expressed to me today this subject is not an easy one for you to discuss, is that correct?

Mr. Hardy: Right, I feel like I'm putting my family on the line.

Mr. Beard: Mr. Hardy, why are you talking to me and Mr. Taylor today?

Mr. Hardy: Because I felt like that the people on the jury didn't have no business being on the jury. I felt like that Mr. Taner should have a better oportunity to get somebody that would review the facts right, that were able to review the facts.

(p. 23) Statement: Hardy

Mr. Beard: Mr. Hardy, I want to make sure I understand you perfectly . . .

CONTINUING ON
SIDE B

Mr. Beard: Mr. Hardy, we have switched to side 2 of this tape, and I asked you before we turned the tape over what motivated you to come forward? I want to make sure I understand you clearly. Are you telling me that your motivated by conscience?

Mr. Hardy: Right. I wanted to clear my conscience.

Mr. Beard: Is there anything else that motivated you, Mr. Hardy?

Mr. Hardy: No.

Mr. Beard: Has anybody offered you anything of value?

Mr. Hardy: No.

Mr. Beard: Has Mr. Tanner had any contact with you and encouraged you to come forward?

Mr. Hardy: No. The only time I ever seen Mr. Tanner was at the trial.

Mr. Beard: Has Mr. Best had any contact with you and encouraged you to come forward?

Mr. Hardy: No, he hasn't.

Mr. Beard: All right. When I say contact, I mean other than your most recent Saturday contact?

Mr. Hardy: Right.

Mr. Beard: Has Mr. Best offered you anything to come forward?

Mr. Hardy: No.

Mr. Beard: Have Mr. Taylor or I offered you anything of value to come forward?

(p. 24) Statement: Hardy

Mr. Hardy: No.

Mr. Beard: Dan, a few minutes ago while we were talking, I asked you to restrict your comments to activities involving the jurors that took place during the noon hour,

now I'd like to talk to you briefly about any activities that took place other than the noon hour. Were there occasions when you got together with other male or female jurors and participated in the use of marijuana or other drugs after the trial was completed for the day?

Mr. Hardy: Yes. I didn't, not, I never participated after, but it was done, I was there.

Mr. Beard: Tell me about those times.

Mr. Hardy: A couple times we went to the Sheraton, couple times we went to the Hyatt Regency and we just sit talk about the trial and you know, just like friends getting together.

Mr. Beard: All right. Mr. Hardy, when you say that you sat around and talked about the trial, do you recall the admonishment that Judge Crimsmon gave you and the other jurors during the trial, and when I say gave it to you, I mean gave it to you every time before you left the jury box at lunch and at the end of the day and specifically, with regard to not discussing the case even among yourselves?

Mr. Hardy: Yes, I do.

Mr. Beard: Did you have occasions to discuss that admonishment with other jurors?

Mr. Hardy: Yes, we did.

Mr. Beard: What was the attitude?

(p. 25) Statement: Hardy

Mr. Hardy: They can't prove nothing.

Mr. Beard: Did members of the jury, in fact, discuss the evidence routinely?

Mr. Hardy: Yes, they did.

Mr. Beard: When I say routinely . . .

Mr. Hardy: That was mostly the topic of the conversation.

Mr. Beard: Did you talk about it on a daily basis?

Mr. Hardy: Yes, we did.

Mr. Beard: Were there times when the entire jury got together for lunch and the subject of the trial was discussed?

Mr. Hardy: Yeah, but not the entire jury, I mean not everybody, there was a few of the older women that went their own ways.

Mr. Beard: All right.

Mr. Hardy: A couple of them, they were straight down the line.

Mr. Beard: What do you mean by that, Mr. Hardy?

Mr. Hardy: Well, they were sticking to what we was supposed to be done.

Mr. Beard: All right. Mr. Hardy, during the course of the trial, did you become aware that the young blond juror by the name of John was using cocaine during the breaks in the trial?

Mr. Hardy: I felt like he was, I never seen him, but I knew he had that little contraption and he was going to the bathroom and come back down sniffing.

Mr. Beard: What do you mean come back out sniffing?

Mr. Hardy: Well, he'd sniffing, you know, you know, you know, like he got

(p. 26) Statement: Hardy

a cold, it would always seem like always had a cold.

Mr. Beard: All right. Mr. Hardy, during the course of the trial, did you learn that the young blond juror by the name of John had, in fact, sold a quarter of pound of marijuana to the juror who was a carpet cleaner from Bradenton?

Mr. Hardy: Yes, I did.

Mr. Beard: How did you learn about that?

Mr. Hardy: 'Cause he talked about it at lunch and he went to his, he was supposed to meet him in, at his house in St. Pete to pick it up.

Mr. Beard: Did you actually hear this conversation?

Mr. Hardy: Yes, I did.

Mr. Beard: Was there anyone else present?

Mr. Hardy: Yes, there was.

Mr. Beard: Who?

Mr. Hardy: Craig.

Mr. Beard: Did John provide the carpet cleaner from Bradenton with his home address?

Mr. Hardy: Yes, he did.

Mr. Beard: Did you see him do that?

Mr. Hardy: Yes, I did, telephone number too.

Mr. Beard: Was there discussion of price with regard to this quarter pound or marijuana?

Mr. Hardy: Yes, there was.

Mr. Beard: How much?

Mr. Hardy: Two hundred and fifty dollars.

Mr. Beard: Was there discussion of price with regard to cocaine at any time?

(p. 27) Statement: Hardy

Mr. Hardy: Yes, there was.

Mr. Beard: Can you explain to me how that came about and what was discussed?

Mr. Hardy: He wanted to know if we wanted any cocaine, he said that he had an ounce of it and he would sell it to us for eighty dollars a gram.

Mr. Beard: Eighty dollars a gram?

Mr. Hardy: Right.

Mr. Beard: Who was offering the cocaine for sale?

Mr. Hardy: John.

Mr. Beard: When did these conversations take place?

Mr. Hardy: During the lunch hour and after the break of the day.

Mr. Beard: Mr. Hardy, to your knowledge, do any of the female jurors who were on the Tanner jury, have any knowledge concerning marijuana or cocaine?

Mr. Hardy: No.

Mr. Beard: Essentially, they know nothing about it as far as you know?

Mr. Hardy: Right.

Mr. Beard: All right. Mr. Hardy, during the course of the Tanner trial, and specifically during lunch, did the four male jurors have discussions about cocaine in general and the various methods that it could be used?

Mr. Hardy: Yes, we did.

Mr. Beard: Explain to me about that.

Mr. Hardy: John used to talk, he was trying to explain to the carpet cleaning guy how to freebase it.

(p. 28) Statement: Hardy

Mr. Beard: What does freebasing mean?

Mr. Hardy: I don't know, just from what I got from them, from the conversations was that they smoked it. That you would smoke it, and cocaine is supposed to be cut and you have to cook it down, or whatever to do with it to be able to get the cut so you can get the pure cocaine out, that's what I got from the conversation.

Mr. Beard: Mr. Hardy, in your discussions or your dealings with John, the young juror, blond juror, did you ever observe any other method of injesting cocaine that John used?

Mr. Hardy: Yeah, he have like, of a sandwich bag that the corner was pulled off of it and it had a metal tie that would be wrapped around he would keep that and little straw and a razor blade inside of a Secrets package.

Mr. Beard: All right, let me talk to you about that more specifically. Are we talking about a regular straw that he would put up to his nose?

Mr. Hardy: Right.

Mr. Beard: All right. Now, what were the other pieces of equipment?

Mr. Hardy: A razor blade.

Mr. Beard: A razor blade? Where was the razor kept?

Mr. Hardy: Inside the pack, inside the metal cases that you'd buy Sucrets, I remember that, it was that you would buy Sucrets throat lozenges with.

Mr. Beard: All right. So, it was a small flat case? What else was inside that Sucrets case?

(p. 29) Statement: Hardy

Mr. Hardy: The cocaine too.

Mr. Beard: All right. What was the cocaine kept in?

Mr. Hardy: A sandwich baggie with the corner of the sandwich baggie.

Mr. Beard: Mr. Hardy, I have no further questions for you. Is there anything that you would like to add, other than what we've already discussed?

Mr. Hardy: I would come forward a long time ago, but I was scared because this is serious allegations being made and that I didn't want to get involved, I was scared of losing my job and putting my family on the line and so I just felt like that I should leave things alone and keep my mouth shut and go on about my life, go on with my life.

Mr. Beard: Mr. Hardy, we've identified one of the male jurors as a carpet cleaner from Bradenton. Do you recall anything about his name?

Mr. Hardy: Yes, I do.

Mr. Beard: What?

Mr. Hardy: His first name is Pat.

Mr. Beard: All right. Mr. Hardy, I've got one final question for you. During the period of time that you participated with the other male jurors in the consumption of beer and in the use of marijuana, do you feel that the combination of that usage affected your reasoning ability during the trial?

Mr. Hardy: Yes. That one day.

Mr. Beard: All right, when you say yes that one day, are you telling me there was only one day that you

(p. 30) Statement: Hardy

consumed both alcohol and marijuana?

Mr. Hardy: Marijuana, I consumed alcohol all the time.

Mr. Beard: All right. Was there only one day that you did both?

Mr. Hardy: Right. Yes, that was in the middle of the trial.

Mr. Beard: All right. Mr. Hardy, anything else you'd like to add?

Mr. Hardy: No.

Mr. Beard: All right, thank you, sir.

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

BEFORE ME, the undersigned authority, personally appeared DANIEL MARTIN HARDY, who, after being duly sworn, deposes and says that he has read the above and foregoing statement consisting of thirty (30) pages, that he has personal knowledge of the facts and matters set forth therein, and that the statement is true and correct to the best of his knowledge.

/s/ Daniel Martin Hardy

Sworn to and subscribed before me,
this 17th day of October,
A.D., 1984.

/s/ O. Douglas Beard

Notary Public, State of Florida at Large
My Commission Expires July 13, 1985
Bonded by Lawyers Surety Corporation

EXHIBIT B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO.: 83-70-Cr-T-8

UNITED STATES OF AMERICA

vs.

WILLIAM M. CONOVER and
ANTHONY R. TANNER
_____/

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF ORANGE

Personally appeared before me, DAVID R. BEST, who, after being duly sworn, deposes and says:

1. Affiant was one of the attorneys of record for Defendant TANNER in the trial in the above styled cause.

2. At approximately 2:00 p.m. on October 13, 1984, a white male drove his car into the driveway of Affiant's home at 836 S.W. Kings Bay Drive, Crystal River, Florida; and said man identified himself as Daniel M. Hardy, stating that "I was on your jury in Tampa."

3. The visit to the home of Affiant was totally unexpected and unsolicited by Affiant.

4. At the said time and place, the said Mr. Hardy stated that not only had certain of the jurors drunk intoxicating beverages at lunch during the said trial, certain of the male jurors had "smoked marijuana together" to the extent that their abilities to comprehend the evidence were impaired.

5. At the said time and place, the conversation between Affiant and the said Mr. Hardy was witnessed by a female represented to be the wife of Mr. Hardy and by the wife of Affiant, Sandra K. Best.

6. At the said time and place, the said Mr. Hardy stated that the jury had conducted itself as though the proceeding was "one big party"; and the said Mr. Hardy stated that, "I have had this on my mind for a long time."

7. At the said time and place, the said wife of Mr. Hardy requested that Affiant take no action on this matter until "we can think about it until Monday morning." Said Mr. Hardy requested that Affiant telephone him at approximately 8:00 a.m. on Monday, October 15, 1984; and the said Mr. Hardy wrote his home number on a business card and gave same to Affiant.

8. At approximately 8:00 a.m. on Monday, October 15, 1984, Affiant telephoned Mr. Hardy at which time the said Mr. Hardy agreed to come forward and "tell the truth" regarding the said misconduct of the jury during the trial in the above styled case. Immediately following the said telephone conversation between Affiant and said Mr. Hardy, Affiant telephoned Mr. Douglas Beard and requested that said Mr. Beard interview Mr. Hardy and attempt to take a sworn statement from him. It is the understanding of Affiant that the said Mr. Beard met the said Mr. Hardy and secured a sworn statement to be used in connection with the allegations of improper conduct by the said jury.

FURTHER AFFIANT SAYETH NOT.

/s/ David R. Best

SWORN TO and SUBSCRIBED before me this 17th day of October, 1984.

Sandra Duclos
Notary Public
State of Florida
My Commission Expires
Feb. 24, 1987

EXHIBIT C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO.: 83-70-Cr-T-S

UNITED STATES OF AMERICA

vs.

WILLIAM M. CONOVER and
ANTHONY R. TANNER
_____/

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF ORANGE

Personally appeared before me, O. DOUGLAS BEARD, who, after being duly sworn, deposes and says:

On October 17, 1984, I personally interviewed Daniel Hardy at the Holiday Inn located in Plant City, Florida. During the course of this interview, Mr. Hardy stated that he served as a juror on the Anthony Tanner trial that occurred in Federal District Court during February and March, 1984, in Tampa, Florida. Mr. Hardy further advised that he and two other male jurors identified as Pat and John consumed one pitcher of beer each on the day the verdict was rendered. Mr. Hardy further advised that this quantity of beer was consumed by each of the male jurors within three hours of rendering a verdict in the case.

/s/ O. Douglas Beard

Sworn to and Subscribed before me this 17th day of October, 1984.

/s/ Sandra Duclos
Notary Public, State of Florida
My Commission Expires
Feb. 24, 1987
Bonded by Ohio Casualty
Insurance Co.

_____

EXHIBIT D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 83-70-CR-T-8

UNITED STATES OF AMERICA

vs.

ANTHONY R. TANNER

_____/

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF ORANGE

BEFORE ME, the undersigned authority duly authorized to administer oaths and take acknowledgments, personally appeared DAVID R. BEST, who, after being duly sworn and upon his oath did say:

1. The undersigned Affiant was the attorney of record for Defendant, ANTHONY R. TANNER, in the above-styled cause.

2. On April 18, 1984 at approximately 1:45 P.M. the undersigned Affiant received at his office in Orlando, Florida a telephone call from his office in Crystal River, Florida advising that one Vera Asbel had called and wanted him to return her call to (813) 996-2161.

3. A few minutes after 1:45 P.M. on said date, Affiant telephoned said number, and a female person answered the telephone identifying herself as Vera Asbel, one of the jurors in the trial of the above-styled cause.

4. The said Vera Asbel stated that "I have tried to get a hold of you since the trial, but I couldn't locate you [until now]." The said Ms. Asbel went on to say: "I can't sleep at night, and I had to get this off my conscience."

5. The substance of the remaining statements by the said Vera Asbel during the said telephone conversation are as follows:

a. The said Vera Asbel stated that she did "not believe the Defendants are guilty," and that she should have "stood her ground" during the deliberations by the jury.

b. The said Vera Asbel stated several of the male jurors drank alcoholic beverages during lunch on numerous occasions throughout the trial of this cause and then "slept through the afternoons."

c. Ms. Asbel stated that some of the male jurors were drinking every day and "didn't care about the trial or the Defendants", and on one occasion one of the male jurors told Ms. Asbel that "we had a liquid lunch."

d. The said Vera Asbel advised that one of the male jurors who drank alcoholic beverages throughout the trial, intimidated her and some of the other jurors during deliberations, causing the said Ms. Asbel to agree that the Defendants were guilty when she did not believe that they were.

5. The said Vera Asbel went on to say that one Tina Franklin, also a juror in this cause, shared Ms. Asbel's observations, convictions and conclusions about the conduct of the said several male jurors.

6. The thrust and substance of the comments and remarks by the said Vera Asbel to the undersigned Affiant left no doubt that Ms. Asbel believes that the drinking of alcoholic beverages by the said male jurors caused them to be less concerned about their responsibilities as jurors and caused them to sleep during much of the afternoon testimony. The said undersigned Affiant got the clear impression from the said telephone conversation with the said Vera Asbel that the Defendants were deprived of their right to have a fair, impartial and attentive jury decide their fate.

FURTHER AFFIANT SAYETH NOT.

/s/ David R. Best

SWORN to and SUBSCRIBED
before me this 19th day
of April, 1984.

/s/ Sandra B. Hamilton
Notary Public, State of Florida at Large
My Commission Expires April 20, 1984
Bonded Thru Troy Fain Insurance Inc.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-70-Cr-T-8

UNITED STATES OF AMERICA

v.

WILLIAM CONOVER
ANTHONY TANNER

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR A NEW TRIAL

The United States of America, by Robert W. Merkle, United States Attorney for the Middle District of Florida, submits the following Response to Defendant's Motion for a New Trial.

Defendant Tanner in his Motion alleges jury misconduct as his grounds to obtain a new trial. The defendant has attached affidavits to his motion in support thereof. Apparently, in direct violation of an order (Exhibit A) entered by this Court, defense counsel has had a private investigator interview and take a sworn statement from juror Daniel Hardy who makes various criminal allegations against other members of the jury. These affidavits should not be considered by this Court or any court as they are specifically precluded under Rule 606(b) of the Federal Rules of Evidence.

Defendant Tanner has previously attempted to have this Court set aside the guilty verdicts by alleging jury misconduct. On May 30, 1984, this Court conducted a hearing on the allegations of alcohol abuse by members

of the jury and denied the motions and denied the defendant's request to interview jurors. (See Exhibit B). This Court previously found that the allegations of alcohol abuse by the jurors did not "prove that extraneous prejudicial information was improperly brought to the jurors' attention or that any outside influence was improperly brought to bear upon any juror," as required by Rule 606(b) of the Federal Rules of Evidence. The defendant's most recent attack does nothing more than include the ingestion or inhalation of drugs with the ingestion of alcohol. The legal thrust of his most recent motion is identical to the issue which has already been ruled on by this Court against him.

The law is clear that the result of this motion would be and should be the same as the first hearing, since there is nothing to show that there was any extraneous prejudicial information or any outside influence brought to bear on any juror. As a general rule, a jury's verdict is not subject to attack unless it can be shown by competent evidence that it was coerced by some improper outside influence. *Jenkins v. United States*, 380 U.S. 445, 446 (1965); *United States v. Badoltao*, 710 F.2d 1509, 1515 (11th Cir. 1983). Furthermore, a juror generally cannot impeach his own verdict. *United States v. Weiner*, 578 F.2d 757, 764 (9th Cir. 1978), citing *McDonald v. Pless*, 238 U.S. 264 (1915). Biases and prejudices of jurors, secret motives or beliefs of jurors and matters occurring during deliberations, including pressure exerted by one juror over another cannot be questioned after the verdict. *See, e.g., United States v. Bagnariol*, 665 F.2d 877, 884 (9th Cir. 1981); *United States v. Hockridge*, 573 F.2d 752 (2d Cir. 1978).

Inquiry into the validity of a verdict is governed by Rule 606(b) of the Federal Rules of Evidence, which provides:

> (b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Rule 606(b) itself allows only two areas of inquiry. Those areas are: (1) extraneous prejudicial information improperly being brought to the jury's attention; or (2) outside influence improperly being brought to bear upon any juror. The question in this case is whether the contentions raised by the defendant are cognizable under Rule 606(b), and the government submits that they are not. This Court has previously ruled that alcohol consumption did not fall into the two areas of inquiry and it is submitted that the ingestion of a drug would likewise not be an extraneous influence.

As previously stated, the Government contends that the affidavit accompanying the defendant's motion should be precluded from consideration pursuant to Rule 606(b) of the Federal Rules of Evidence. If this Court chooses to

read the Hardy affidavit, it will find that the affidavit fails to reveal that any prejudice or improper outside influence was brought to bear on the jury as contemplated by Rule 606(b). Moreover, the affidavit does not contain any allegations by the juror that any juror was intoxicated, through the use of alcohol or drugs, to the extent that they were unqualified to serve as a juror. Mr. Hardy states that in his opinion on *one* day his reasoning ability was affected. The trial lasted over four weeks, and that one day was not during the deliberation of the jury. It does not contain an allegation that any of the jurors were incapable of hearing or understanding the evidence or conducting deliberations. A conclusory allegation that the defendants must have been deprived of a fair trial because of the matters contained in Mr. Hardy's comments must be dismissed as legally insufficient.

Assuming that a juror was intoxicated or ingesting drugs, it does not follow that defendants were prejudiced by that fact. There is no necessary connection between use of alcoholic beverages or drugs and a desire to convict. There is further no connection between use of alcoholic beverages and drugs and use of intimidating tactics during deliberations. These factors are all part of the subjective deliberative process and cannot be questioned.

The record of the trial also tends to refute the contentions in the motion and affidavit. These are the facts:

(1) It was never brought to the Court's attention that any juror was misusing alcohol or drugs;

(2) It was never brought to the Court's attention by any of the defense counsel that any juror appeared not to be paying attention or was otherwise incapacitated, except on one occasion;

(3) The Court's instructions were not coercive;

(4) The jury never indicated that it was having difficulty reaching a verdict or that it was deadlocked;

(5) The jury acquitted defendant Tanner on one count; and

(6) The jury was polled *after* the verdict and each and every juror affirmed the verdict. (Exhibit C).

Based on all these uncontestable facts, there can be no doubt that the motion is frivolous. Assuming defendant's contentions are true, there is no basis for granting a motion to set aside the verdict, to interview other jurors or to conduct an additional evidentiary hearing. There is nothing in the affidavit which requires a further evidentiary hearing. There is no need to inquire of the jurors the *affect* of the alleged "outside influence" because no "outside influence" has really been alleged. The motion is nothing more than a clever attempt to set aside a guilty verdict through incompetent and insufficient evidence.

There is yet an additional reason for denying this motion. It is untimely. Rule 33 of the Federal Rules of Criminal Procedure requires that a motion for a new trial be made within seven days unless the ground is based on newly discovered evidence. Based on a review of the May 30, 1984, hearing conducted in connection with the first motion, it is obvious that the defendants have been aware of this possible ground since the trial itself. Mr. David Best represented to the Court that he had observed several jurors sleeping during the trial, but had said nothing to the Court. (Exhibit B at Page 57). Mr. Best also produced an affidavit of a Mr. Van Lengren who was em-

ployed by defendant Tanner to observe the proceedings. According to Mr. Best, Van Lengren overheard the jurors discussing where they were going to drink their lunch. (Exhibit B at Page 55). Since defendant Tanner had this information during the trial, the appropriate course of action should have been to bring it to the Court's attention at that time. Defendants' decision not to was apparently a tactical one. Defendants cannot now attempt to set aside a verdict because a tactical decision failed.

WHEREFORE, the United States of America requests this Court to deny defendant's Motion. Defense counsel have not asserted any new grounds contemplated in Rule 606(b) which would allow inquiry into the validity of the jury's verdict. The sanctity of the jury process should be carefully guarded as well as the finality of its verdict. Accordingly, the Motion for a New Trial should be denied.

Respectfully submitted,

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[Certificate of Service omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No.
83-70 Cr-T-8

vs.

WILLIAM M. CONOVER and
ANTHONY R. TANNER,

Defendants.

ORDER

(Filed December 4, 1984)

This case is on appeal to the Appellate Court for the Eleventh Circuit as Number 84-3431.

Apparently defendants, as appellants, made filings before that court requesting that the appeal be remanded for consideration of a motion for new trial.

On November 13, 1984 that court denied appellants' (defendants) motion to remand the appeal to this Court, "without prejudice to the movant to follow the preferred procedure outlined in *United States v. Fuentes-Loyano*, 580 F.2d 724 (5th Cir. 1978) and approved in *United States v. Reeb*, 725 F.2d 633 (11th Cir. 1984).

On November 21, 1984 defendant Tanner filed a "Memorandum in Support of Motion for a New Trial based on newly discovered evidence of juror misconduct." On November 26, 1984 defendant Conover filed a "Notice of Adoption of said motion and a memorandum in support thereof."

On November 30, 1984 the government filed a response thereto. Attached to the government's response as Exhibits are copies of an Order I entered on May 30, 1984 denying defendants' motion for new trial filed April 19, 1984, and a transcript of a hearing on said motion held May 30, 1984.

At the time the April 19 motion was filed defendants sought permission to interview the trial jurors. Attached hereto and incorporated by reference is copy of an Order I entered on April 23, 1984, responsive to the motion to interview jurors.

The procedure to be followed where a motion for new trial is filed, while a case is on appeal as provided in *United States v. Fuentes-Lozano, supra,* at page 725, is

> If upon hearing the motion, the trial court is inclined to deny it, the court may do so; a separate appeal may then be taken from the denial of the motion and consolidated with the pending appeal. On the other hand, if the district court thinks that the motion should be granted, it should certify that determination to the appellate court in order that the appellate court may entertain a motion to remand.

In effect I have heard argument as to the legal principles involved in the motion (transcript of May 30, 1984). The November 1984 motions contain supplemental allegations which differ quantitatively but not qualitatively from those in the April motions.

Rule 606(b) Federal Rules of Evidence is applicable to the situation.

The competing values served and protected by Rule 606(b) are fairly stated in the Advisory Committee's note to the rule as follows:

> Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. *McDonald v. Pless,* 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915). On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.
>
> The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. See *Grenz v. Werre,* 129 N.W. 2d 681 (N.D. 1964). The authorities are in virtually complete accord in excluding the evidence. Fryer, Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial 345, 347 (Fryer ed. 1957); Maguire, Weinstein, et al., Cases on Evidence 887 (5th ed. 1965); 8 Wigmore § 2349 (McNaughton Rev. 1961). As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. 8 Wigmore § 2354 (McNaughton Rev. 1961). However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. *Mattox v. United States,* 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1802).

Applying the exclusionary provisions of that rule to the allegations, affidavits and deposition offered by defendants results in a complete failure to establish or prove that extraneous prejudicial information was improperly brought to the jurors attentions or that any outside influence was improperly brought to bear upon any jurors.

Upon consideration of defendants' motions and memoranda, of their argument at the May 30 hearing, the government's argument at the May 30 hearing and the government's November 30 memorandum, for the reasons given in my Orders of April 23, 1984 and May 30, 1984 and in the record on May 30, 1984, I find and am of the opinion that "I am inclined to" and do DENY defendants' pending motions for new trial.

As provided in *United States v. Fuentes-Lozano, supra,* at page 726 defendants may now take a separate appeal from the denials of their current motions which will be consolidated with the pending appeal.

IT IS SO ORDERED at Tampa, Florida this 4th day of December, 1984.

/s/ BEN KRENTZMAN
SENIOR U.S. DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-177

In The
Supreme Court of the United States
October Term, 1986

ANTHONY R. TANNER and WILLIAM M. CONOVER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

I. Whether Section 371, which criminalizes conspiracies "to defraud the United States," "plainly and unmistakably" extends to a conspiracy to defraud a private corporation which is neither an agency nor representative of the federal government and which has no relation to the federal government except that it is a recipient of a federally guaranteed loan.

II. Whether sworn evidence that jurors in a complex criminal case consumed drugs and quantities of alcohol throughout the proceeding, rendering them unable to review the facts, requires an evidentiary hearing to determine whether defendants were afforded a fair trial by a jury capable of deciding the case on the evidence.

LIST OF PARTIES TO PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties to the appeal to the United States Court of Appeals for the Eleventh Circuit.

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No. 86-177

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United States Court of Appeals
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BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet.App.3-22)[1] is reported at *United*

[1] (Pet.App.—) refers to the appendix to the petition for writ of certiorari; (J.A.—) refers to the Joint Appendix; (R.—) refers to the pleadings contained in the Record on Appeal; and (V.—) refers to the trial transcript. Where volume numbers for the trial transcript are available, they are indicated after the "V," followed by a colon and page number (e.g., V.2:67). Where the trial transcripts are identified by the day of the trial only, the appropriate date is indicated after the "V," followed by a colon and page number (e.g., V.2/22:67). (GX—), (CDX—) and (TDX—) refer to the government's exhibits, petitioner Conover's exhibits and petitioner Tanner's exhibits, respectively.

States v. Conover, 772 F.2d 765 (11th Cir.1985). The court of appeals' order denying rehearing and rehearing *en banc* (Pet.App.1-2) is reported at 795 F.2d 89 (11th Cir.1986). The final judgment of the trial court (J.A.183,185) was not printed in an official reporter.

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JURISDICTION

The judgment of the court of appeals was entered on September 30, 1985. A petition for rehearing with a suggestion for rehearing *en banc* was denied on June 26, 1986 (Pet.App.1-2). A petition for writ of certiorari was filed on August 2, 1986, and was granted on November 3, 1986. The jurisdiction of this Court rests on 28 U.S.C.§ 1254(1) (1982).

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CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND RULES INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . ."

18 U.S.C.§ 371 (1982)—Conspiracy to Commit Offense or To Defraud United States:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Fed.R.Evid.606—*Competency of Juror as Witness:*

> "(b) Inquiry into validity of verdict or indictment.
>
> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

———o———

STATEMENT

Anthony R. Tanner, a private contractor, and William M. Conover, the former Manager of Procurement of Seminole Electric Cooperative, Inc. ("Seminole"), a private Florida corporation, were convicted of conspiring to "de-

fraud the United States" by impeding the "functions of the Rural Electrification Administration in its administration and enforcement of its guaranteed loan program." (J.A. 5).[2] They appealed, contending that the expansion of the federal conspiracy statute to a case in which the federal government was neither defrauded of any funds or property nor was there any interference with government officials or their agents performing a governmental function, deprived them of due process and would make a federal crime of any dishonest act between private parties where the defrauded party had any relationship with the federal government, no matter how slight. Further, petitioners contended that an affidavit which demonstrated that the jurors consumed drugs and quantities of alcohol throughout the course of the trial which rendered them unable to review the facts at the very least required an evidentiary hearing to determine whether defendants were afforded a fair trial by a jury capable of deciding the case on the evidence. The court of appeals affirmed, holding that petitioners' conduct "constituted a fraud on the United States," despite a total absence of evidence of pecuniary loss to the government or of conspiracy to influence or interfere with any governmental function (Pet.App.12-13), and that because there was no allegation of "outside influence" under Fed.R.Evid.606(b), "the district court was under no duty to investigate the allegations" concerning the use of drugs and alcohol by jurors during the proceedings. (Pet.App.10).

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2 Petitioners were also convicted of several counts under the mail fraud statute, 18 U.S.C.§ 1341 (1982), arising out of the same transaction.

1. Seminole is a private Florida corporation created under Chapter 425 of the Florida Statutes, entitled "Rural Electric Cooperatives," to generate and transmit electrical energy to the eleven rural electric distribution cooperatives which own and operate Seminole. In 1979, Seminole made application with the Rural Electrification Administration ("REA"), an agency of the United States Department of Agriculture, to borrow $1.1 billion through the Federal Financing Bank, an agency of the United States Treasury, to construct a coal-fired generating plant near Palatka, Florida. Application was made through the Federal Financing Bank rather than a private lending institution because it offered the lowest interest rate. (V.2:57). REA approved Seminole's application and guaranteed the loan, which was secured by a promissory note and mortgage from Seminole of Seminole's plants, transmission lines and related facilities. (GX 1-H; V.2:55-57). Construction of the power plant began in September 1979. In order to install a transmission line from the plant to a substation located outside of Ocala, Florida, it was necessary to build a patrol road to allow access to the line by heavy trucks and construction equipment and for maintenance over an estimated thirty to forty years. (V:3:19-21, 71).

The road construction contract was originally awarded to Journagan Construction Company, but soon after construction began, it became apparent that the locally available sand material utilized by Journagan would not compact sufficiently to support even lightweight vehicles. As a result, a soil engineer was brought in to conduct soil tests and make recommendations as to the stabilization of the road. (V.5:139-41). He recommended that Seminole use a two-step process, using sand as the fill material and then

topping the sand off with a clay/sand mixture which was more cohesive and, therefore, more stable. (V.5:139-41). Journagan was unable to obtain sufficient clay/sand material (V.3:92-93), and because of the time required to utilize this two-step process, it was not able to meet the construction schedule.

A meeting was held at Seminole's office in March 1981 to discuss the need to obtain sufficient materials to complete the project on schedule. (V.2/16:11-13). Since beginning construction in late 1980, Journagan had completed only 3.5 of the 51 miles of patrol road and completion of the transmission line was scheduled for March 1982. (V.3:46; V.8:50). Journagan's proposal that it be paid an additional $4.5 million to complete the road was rejected by Seminole which instructed its employee, Conover, as Director of Procurement, to locate a new source of material and secure that material for Seminole. (V.2/29:25-26; V.2/16:14).

Following the meeting, Conover called on Tanner, a friend of his, who was involved in real estate development and owned a limerock mine. They discussed using limerock and limerock overburden as an alternative fill material. (V.4:109). That material was inspected and approved by Seminole's Engineering Manager, and Tanner began supplying materials under a purchase order on an interim basis so that road building could continue while bids were solicited for the remainder of the job. (V.2/16:18-19). In less than one and a half months, using limerock overburden supplied by Tanner, more than five additional miles of road were constructed. (V.13:165, 170-71).

Because Seminole's internal policy required all contracts in excess of $200,000 to be let for bid, Seminole's Engineering Manager was instructed to develop bid specifications for the fill materials contract which would describe the material Seminole was receiving under the purchase order from Tanner, in order to avoid the problems with inadequate material it had experienced in the past. (V.8:17-18, 51; V.2/16:20). These specifications precluded the use of the clay/sand process recommended by the soil engineer and gave Tanner, who had an undeveloped limerock mine relatively close by, an advantage over the other bidders. Tanner submitted the lowest bid for the fill contract and, in addition, submitted the lowest bid on a separate spreading contract. (V.4:16-20).

Although the indictment charged that

> "the Rural Electrification Administration required borrowers participating in its guaranteed loan program to comply with its rules and regulations applicable to the procurement of material, equipment and services to be used in the construction of electrical plants and transmission lines," (J.A.3),

there was no evidence that REA approval of the contracts awarded Tanner was required, and petitioners offered evidence (excluded by the judge) that such approval was *not* required.[3] The patrol road completed by Tanner in October

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[3] The trial judge excluded the letter dated July 24, 1981, from the Director of Power Supply Division of REA to the Manager of Seminole, upon the ground that the question of whether the federal government had been defrauded was a "jurisdictional" question for the court, rather than an issue for the jury. (V.2/28:34-36, V.8:132-37). That letter stated in part:

> "Under the terms of the REA-Seminole loan contract and implementing REA regulations, Seminole was not required to obtain specific REA approval of either the limerock contract dated November 13, 1980, with Citra Mining, Inc.,

(Continued on following page)

1981 was satisfactory for its intended purpose (V.4:139-47; CDX 26 for id.)[4] and was less costly than the clay/sand mixture the government argued should have been used. (*See* GX3I; V.14:153-54, 169-71; V.3:107; V.2/16:70).

Prior to the completion of the road, one of the member cooperatives initiated an investigation which resulted in the suspension of Conover for violating Seminole's conflict of interest policies when it was shown that Tanner and Conover had extensive business and personal dealings before and after the award of the contracts, including fishing trips to the Bahamas together, a contract by Conover to buy a condominium from Tanner, and landscaping work by Conover for Tanner on an apartment project. (V.4: 100-02; V.12:8-9; V.4:86, 97-98.)

Rejecting petitioners' contention that the indictment failed to charge and the evidence failed to establish a conspiracy to "defraud the United States," the majority of the court of appeals deemed the indictment sufficient to charge a crime under Section 371, asserting that the interest of the United States "'extends to seeing that the

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(Continued from previous page)

> or the fill dirt contract dated May 14, 1981, with Citrus Sand and Clay, Inc. [Tanner's companies]. *While REA did receive copies of the contracts and did provide Seminole with comments on the contracts, neither the contracts nor the bidding procedure used in either case required REA approval.*" (J.A.52) (emphasis added).

[4] The trial judge acknowledged that limestone produced a superior road (V.13:13-14), and as a result, excluded a substantial amount of evidence as to the suitability and quality of the patrol road, stating the issue was *not* the quality of the road built by Tanner, but "whether there was sufficient sand/clay in Putnam County." (V.13:13).

entire [Seminole] project is administered honestly and efficiently and without corruption and waste.'" (Pet.App. 12-13) (citation omitted). In a special concurring opinion as to this issue, Circuit Judge Hill stated:

> "Section 371 criminalizes conspiracies 'to defraud the United States, or any agency thereof in any manner or for any purpose.' It does not criminalize a conspiracy to defraud a private party. The evidence in this case was sufficient to prove that the defendants conspired to defraud Seminole Electric. *In my view, however, the prosecution did not prove a conspiracy to defraud the government of the United States.*"
>
> "... No Supreme Court decision has upheld a conviction under section 371 ... where the defendants neither defrauded the federal government of its funds or property nor interfered with United States government officials or their agents performing an official function of the federal government."
>
> ....
>
> "... [I]n section 371 Congress obviously did not criminalize every conspiracy with the intent or effect of thwarting that objective. Congress has demonstrated well its ability to utilize the criminal law to protect its far-flung financial and other interest in non-federal programs and entities. Because it has not done so here, *section 371 should not be construed to reach appellants' acts.*" (Pet.App.17-18, 21-22) (emphasis added) (footnote omitted).

2. Following the verdict in the second trial (the first trial ended in a hung jury after six weeks), defense trial counsel received a telephone call from a juror stating that several jurors had consumed alcoholic beverages during luncheon recesses and had consequently fallen asleep dur-

ing the afternoon trial sessions. At the conclusion of a hearing to consider legal arguments as to whether affidavits concerning the telephone call required an evidentiary hearing, Judge Krentzman ruled that an evidentiary hearing would *not* be held:

> "[T]here is no admissible evidence which could be or can be obtained from any member of the jury who served in this case. And therefore, I am not going to order or allow an evidentiary hearing of or from the jurors." (V.19:62).

While the appeal was pending, defense counsel received an unsolicited visit at his home from yet another juror who stated that he had been struggling with his conscience for months and felt the defendants should have an opportunity to be judged by jurors who "would review the facts right" (Pet.App.47), rather than by people who felt as though they were "on one big party" (Pet.App.26) and had "no business being on the jury." (Pet.App.47). He confirmed in a sworn statement (Pet.App.23-56) that many of the jurors were consuming large quantities of alcohol each day during the luncheon recess (a liter of wine by the foreperson, one or two mixed drinks each by two other female jurors, and a pitcher of beer each by the male jurors), and stated in addition, that the four male jurors smoked marijuana daily during the lunch recess. Further, two of the jurors were ingesting "a couple of lines" of cocaine at the city parking garage during the lunch breaks. (Pet.App.42, 44). One juror sold a quarter pound of marijuana to another juror during the trial (Pet. App.51), and one took marijuana, cocaine and drug paraphernalia into the United States District Courthouse and came out of the jurors' restroom "sniffing" "like he got

a cold." (Pet.App.51). The juror concluded that the use of these intoxicants and narcotics caused the jurors using them to be "messed up," "stutter a . . . bit," and to be "falling asleep all the time during the trial" (Pet.App.45-46), which prevented the jury from reviewing the facts in this complex case so as to afford the defendants a fair trial. (Pet.App.47).

Despite this sworn evidence of jury misconduct, the district judge again refused to hold an evidentiary hearing (J.A.255) and the court of appeals affirmed, holding that the use of alcohol and narcotics by jurors did not constitute an "outside influence." under Fed.R.Evid.606(b) and, therefore, that "the district court was under no duty to investigate the allegations, and did not abuse its discretion in refusing to conduct an evidentiary hearing." (Pet.App. 10).

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SUMMARY OF ARGUMENT

1. Section 371 criminalizes conspiracies "to defraud the United States." The opinion of the court of appeals extends the reach of Section 371 to a conspiracy involving allegations that a *private contractor* defrauded a *private corporation* without any proof of a conspiracy to defraud the government of the United States. Indeed, the evidence was that petitioners neither defrauded the federal government of its funds or property nor interfered with government officials or their agents performing an official government function.

Seminole, the defrauded private corporation, is neither an agency of the federal government nor its represen-

tative performing an authorized governmental function. Granted, it received a loan from a federal agency which was guaranteed by REA, but this is its only connection to the government. While it is irrefutable that the federal government has an interest in seeing that projects receiving funds guaranteed by it are administered honestly and efficiently and without corruption and waste and, for purposes of this appeal, it is conceded that petitioners engaged in collusive and dishonest business practices, a reading of Section 371 that would make the conduct here a crime *against the United States* imposes an obligation to deal honestly with government that is too broad to be understood by "men of common intelligence." *Connally v. General Construction Co.*, 269 U.S.385, 391 (1926). The court of appeals' opinion ignores the limitations previously imposed by this Court on the reach of Section 371 and would make a federal crime of any wasteful, corrupt, or dishonest act between private parties where there is *any* federal government involvement with the defrauded party, no matter how slight, and where the government involvement is irrelevant to the wrongful act and the government suffers no loss.

There is no indication that Congress intended such a broad reading of the conspiracy statute and this Court has not yet approved such an expansive interpretation. As stated by Judge Hill in his special concurrence below, "in the absence of compelling evidence" that a private defrauded party was acting as an agent of the United States performing an authorized function of the federal government, Section 371 should not be read to prohibit wrongful conduct against such "a non-federal entity receiving some form of federal assistance." (Pet.App.19).

The language of Section 371 does not "plainly and unmistakably" cover the petitioners' conduct and the scant legislative history of the statute argues for a limited, rather than expansive, interpretation. Moreover, to the extent that the statute is ambiguous, the *rule of lenity*, which requires a narrow interpretation of criminal statutes, is appropriately invoked to bar the Section 371 prosecution here. *E.g., Williams v. United States*, 458 U.S.279 (1982). Finally, concern for the principle of *federalism* also counsels that this Section 371 prosecution, which attempts to bootstrap a "garden variety" state law crime into a federal crime, should not be allowed. *United States v. Bass*, 404 U.S.336 (1971).

If this Court follows the court of appeals' unwarranted extension of Section 371 to these facts, it would extend the statute beyond the boundaries which have been set by Congress and previous decisions of this Court, would force the federal courts into capricious judicial line drawing and would break free the statute from any restrictions other than the federal prosecutors' unbridled discretion.

2. Despite sworn evidence that jurors in a complex conspiracy case were dealing in and smoking marijuana, ingesting cocaine in the jury room, and regularly consuming alcohol in such quantites as to render them unable to conscientiously "review the facts," the court of appeals held that the district court did not abuse its discretion in refusing to conduct an evidentiary hearing, because Fed.R.Evid. 606(b) limits inquiry of jurors to a determination of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any "outside influence" was improperly brought to bear upon any juror.

This holding overlooks petitioners' right under the sixth amendment to a trial before an impartial and *compe-*

tent jury "capable and willing to decide the case solely on the evidence before it . . . . " *Smith v. Phillips*, 455 U.S.209, 217 (1982); erroneously construes Rule 606(b) as precluding testimony of juror intoxication; and ignores the procedures adopted by this Court to evaluate a *prima facie* showing of jury misconduct:

> "This Court has long held that the remedy for allegations of juror partiality is a *hearing in which the defendant has the opportunity to prove actual bias.*" *Id.* at 215 (citing *Remmer v. United States*, 347 U.S. 227 (1954)) (emphasis added).

ARGUMENT

I

SECTION 371, WHICH CRIMINALIZES CONSPIRACIES "TO DEFRAUD THE UNITED STATES," DOES NOT "PLAINLY AND UNMISTAKABLY" EXTEND TO A CONSPIRACY TO DEFRAUD A PRIVATE CORPORATION WHICH IS NEITHER AN AGENCY NOR REPRESENTATIVE OF THE FEDERAL GOVERNMENT AND WHICH HAS NO RELATION TO THE FEDERAL GOVERNMENT EXCEPT THAT IT IS A RECIPIENT OF A FEDERALLY GUARANTEED LOAN.

The government's theory of "conspiracy to defraud the United States," which was sanctioned by the court of appeals, so blurs the line between what is permitted under Section 371 and what is not as to make the distinction meaningless. By expanding Section 371 completely out of the bounds in which Congress placed it, the court of appeals has potentially placed the federal government, its police and

prosecutors, into virtually every transaction between private entities. If this conclusion is allowed to stand, then "conspiracy to defraud the United States" will remain an unknown and unknowable crime, defined only by the facts in each case and the unchecked discretion of federal prosecutors. Due process demands more precision in a civilized criminal justice system. *See McNabb v. United States*, 318 U.S.332, 340 (1943).

The court below rejected petitioners' contention that a conviction under Section 371 required proof of interference with a lawful government function, violation of a federal statute or regulation, or pecuniary loss to the government. The test applied by the court of appeals was simply that Section 371 is designed to protect the integrity of the United States, its agencies, programs and policies. (Pet.App.12). What the court below ignored in its rush to rationalize a conviction under such a theory are the constitutional impediments to judicial expansion of a criminal statute. "Federal crimes . . . 'are solely creatures of statute,' " and when this Court assesses the reach of a federal criminal statute "a 'narrow interpretation' [is] appropriate." *Dowling v. United States*, 105 S.Ct.3127, 3131-32 (1985) (citations omitted). Thus, a person may not be convicted of a federal crime unless the federal statute " 'plainly and unmistakably' " covers his conduct. *Id.* at 3139 (quoting *United States v. Lacher*, 134 U.S.624, 628 (1890)). This is especially true when the charge is conspiracy "because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable." *Dennis v. United States*, 384 U.S.855, 860 (1966).

The fifth amendment to the Constitution provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." The sixth amendment further affords criminal defendants the right "to be informed of the nature and cause of the accusation" against them. The principles which have developed to insure these constitutional protections include the requirement that an indictment must inform a defendant of the offense charged with sufficient clarity that he will not be misled while preparing his defense. *See Russell v. United States*, 369 U.S.749, 763-65 (1962). The government's prosecution here under Section 371, if allowed to stand, would violate these sacrosanct constitutional protections because the crime charged by the indictment and the proof at trial concerned conduct which is not prohibited by the face of Section 371 and is beyond its scope. The possibility that an agreement is offensive to society is insufficient to bestow federal criminal jurisdiction; rather, the agreement must be proved to be within an area which Congress has specifically controlled. *See United States v. Feola*, 420 U.S.671, 684 (1975); *Hammerschmidt v. United States*, 265 U.S.182, 188 (1924).

A. The Charge Made by the Indictment Was a Conspiracy "to Defraud the United States." Neither the Statute, the Legislative History, Nor the Opinions of This Court Support Prosecution on Such Charge Where the Victim Is a Private Corporation Which Is Neither an Agency of Nor Controlled by the Federal Government.

Petitioners were charged under Section 371 with conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose."[5] However, the evidence did not show any agreement by petitioners to cause the government or any of its agencies a monetary or property loss, to interfere with any lawful function of the government, or to violate any statute or regulation. Moreover, the proof showed that Seminole was not a government agency but, rather, a private corporation in which the government had no proprietary interest. Thus, the government's theory of conspiracy attempts to connect the "conspirators" (petitioners) to the "victim" (the United States) by one slender thread: the REA's guarantee of Seminole's construction loan.[6]

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[5] There are two types of Section 371 conspiracies. "One addresses itself to a conspiracy to commit substantive offenses specified under other statutes; the other to a conspiracy to defraud the United States. [In the latter, the] conspiracy is itself the substantive offense charged in the indictment." *Bridges v. United States*, 346 U.S.209, 229 (1953) (Reed, J., dissenting). The vast majority of prosecutions under Section 371 are for a conspiracy to commit another federal crime. These prosecutions carry with them much less danger that the defendant will be convicted of conduct which is beyond congressional intent because the conspiracy must be linked to a substantive criminal act.

However, in a prosecution for conspiracy "to defraud the United States" the danger of an overreaching prosecution is much greater because of the lack of a substantive "base" for the prosecution as the "conspiracy . . . itself [is] the substantive offense charged." *Id.* Thus, it is even more important in this type of conspiracy case that this Court require strict adherence by the government to the language of the statute, congressional intent and the mandate of the due process clause.

[6] REA acted here merely as a guarantor, with the normal rights of a guarantor to insure that the collateral was secure. Although REA is an agency of the federal government, it does not directly regulate rural utilities such as Seminole. As aptly noted by Judge Hill:

(Continued on following page)

The court of appeals held this to be sufficient to convict petitioners under Section 371:

> "It is undisputed that the money used to construct the power plant was borrowed from the Federal Financing Bank, which is an agency of the United States Treasury; nor is it disputed that the loan was guaranteed by the REA, which is also an agency of the federal government. The evidence supports the conclusion that Tanner and Conover engaged in collusive and dishonest business practices. This constituted a fraud on the United States under Section 371." (Pet.App.13).

A diligent search of the congressional record reveals no congressional intent to punish conspiracies to defraud purely private entities. Indeed, there is little legislative history concerning Section 371. Section 371, enacted in 1948,[7] was merely a recodification of the conspiracy statute which has remained virtually unchanged since initial passage in 1867. Act of March 2, 1867, ch.169, § 30, 14 Stat. 484.[8] *See United States v. Dege*, 364 U.S.51, 56 (1960)

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> "[U]nder the Rural Electrification Act [under which REA functions] Congress has deliberately avoided undertaking the construction of rural power plants as a federal government enterprise." (Pet.App.21) (Hill, J., specially concurring).

See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n, 461 U.S.375, 385 (1983) (Rural Electrification Act does not preempt state regulatory jurisdiction over rural utilities).

7 Act of June 25, 1948, Pub.L.No.772, 62 Stat.701.

8 The 1948 recodification of the conspiracy statute did add the italicized provision: "If two or more persons conspire . . . to defraud the United States, *or any agency thereof* . . . ." 18 U.S.C.§ 371 revisor's note (1982). "[A]gency" is defined as "any department, independent establishment, commission, ad-

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(Warren, C.J., dissenting). The enactment of the original conspiracy statute in 1867 was accompanied by no congressional record or comment about its intended scope. *See* 1 Reports of Committees, 39th Cong., 2d Sess.H.Rep.15 (February 11, 1867); 47 Cong.Globe, 39th Cong., 2d Sess.1920 (1867). *See also United States v. Allen*, 24 Fed.Cas.772 (C.C.E.D.N.Y.1868)(No.14,432). Some indication, however, that Congress did not intend a broad reading of the statute is found from the fact that it was first passed as part of a law " 'relating to Internal Revenue,' " to combat tax violations. *See United States v. Gradwell*, 243 U.S.476, 481 (1916); Goldstein, *Conspiracy to Defraud the United States*, 68 YaleL.J.405, 417-20 (1959).[9] Indeed, an early decision of this Court required a direct, almost physical relationship between the conspirators and the goverment they sought to defraud. *United States v. Hirsch*, 100 U.S.33, 35 (1879) ("The conspiracy here described is a conspiracy to commit any offense against the United States. The

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ministration, authority, board or bureau of the United States *or any corporation in which the United States has a proprietary interest.*" 18 U.S.C.§ 6 (1982) (emphasis added). There, of course, was no proof here that the government had any proprietary interest in Seminole, a private corporation. *Cf. United States v. Walter*, 263 U.S.15 (1923) (government owned 100% of stock of defrauded corporation).

9 According to Professor Goldstein,

> "not a single explanatory reference to [the conspiracy statute] appears in the entire body of [congressional] hearings and reports. All that can be said with certainty about [the conspiracy statute] . . . is that it was enacted at a time and in a setting which strongly suggest that it was aimed at conspiracies either to commit offenses against the internal revenue or to defraud the United States of internal revenue." Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J.405, 418 (1959) (footnote omitted).

fraud mentioned is any fraud against them. *It may be against the coin, or consist in cheating the government of its land or other property.*") (emphasis added.) Thus, what scant information exists concerning Congress' intent in enacting the conspiracy statute, now Section 371, argues for a limited, rather than expansive, reading of the statute.

In his special concurrence below, Judge Hill correctly pointed out that in a Section 371 prosecution, the government "need not show any monetary or property loss to the federal government to sustain a conviction for conspiracy to defraud the United States;" it is sufficient for the government to prove " 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.' " (Pet.App.17) (Hill, J., specially concurring) (quoting *Dennis v. United States*, 384 U.S.855, 861 (1966)). However, in deciding that a Section 371 prosecution should *not* lie in this case, Judge Hill said:

> "No Supreme Court decision has upheld a conviction under section 371 . . . where the defendants neither defrauded the federal government of its funds or property nor interfered with United States government officials or their agents performing an official function of the federal government." (Pet.App.17-18).

Judge Hill is correct. This Court has recognized limits to the conspiracy statute and has not hesitated to hold the government within those limits. Thus, in *United States v. Gradwell*, 243 U.S.476 (1916), this Court sustained a demurrer to an indictment under the predecessor to Section 371, which charged the petitioners with conspiring to defraud the United States by bribing voters. The Court noted that the conspiracy statute was first enacted as part of a law " 'relating to Internal Revenue' " and that

its extension to cover elections "was not intended by Congress." *Id.* at 481. The Court also found that state law was sufficient to protect the electoral process and held:

> "When to all this we add that there are no common-law offenses against the United States . . . , that before a man can be punished as a criminal under the federal law his case must be 'plainly and unmistakably' within the provisions of some statute . . . , we cannot doubt that the District Court was right in holding that the section was never intended to apply to elections . . . ." *Id.* at 485 (citations omitted).

Similarly, in *Hammerschmidt v. United States*, 265 U.S.182 (1924), this Court reversed the court of appeals, which had refused to sustain a demurrer to an indictment which alleged a conspiracy to defraud the United States by interfering with the military draft. The Court noted that it was not necessary that the government prove pecuniary loss by fraud but only that its legitimate official action and purpose be defeated by fraud. *Id.* at 188. Nevertheless, the Court held that not all crimes come within the definition of the words "to defraud" and that "mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it" was not a conspiracy "to defraud the United States." *Id.* at 189.[10]

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[10] To support its affirmance of the Section 371 prosecution here, the court of appeals cited *Hammerschmidt's* statement that a conspiracy to defraud the United States may be proved by evidence of interference with the government's " 'legitimate official action and purpose.' " (Pet.App.11-12) (quoting *Hammerschmidt v. United States*, 265 U.S.182, 188 (1924)). However, as just described, *Hammerschmidt limited* the reach of Section 371 by holding that the indictment at issue did not charge a "conspiracy to defraud the United States." *Hammerschmidt*, 265 U.S. at 189.

In *Krulewitch v. United States*, 336 U.S.440 (1949), the Court reversed a conspiracy conviction on hearsay grounds. In his concurrence, Justice Jackson characterized the "federal law of conspiracy" as "elastic, sprawling and pervasive":

> "Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself . . . *suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.*
>
> "The modern crime of conspiracy is so vague that it almost defies definition." *Id.* at 445-46 (Jackson, J., concurring) (emphasis added).

See Grunewald v. United States, 353 U.S.391, 404 (1957) ("*Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.*") (footnote omitted) (emphasis added).

Cases from this Court upholding Section 371 prosecutions have done so when the conspiracy to defraud involved direct pecuniary loss to the government or interference with governmental functions; no decision of the Court has upheld a Section 371 prosecution when the conspiracy's relationship to the government was as attenuated as here. *E.g., United States v. Johnson*, 383 U.S.169 (1966) (conspiracy to exert influence on the Department of Justice to obtain dismissal of pending indictments); *Glasser v. United States*, 315 U.S.60 (1942) (conspiracy between assistant United States Attorney and private attorney to fix federal cases); *United States v. Kapp*, 302 U.S.214

(1937) (conspiracy to furnish false information to the Secretary of Agriculture to secure benefit payments under the Agricultural Adjustment Act); *United States v. Walter*, 263 U.S.15, 16 (1923) (conspiracy to make fraudulent claim against a corporation "of which the United States owned all the stock"); *Haas v. Henkel*, 216 U.S.462 (1909) (conspiracy to defraud Department of Agriculture by secretly obtaining from the Department advance copies of crop reports).

This Court's most recent interpretation of a Section 371 "conspiracy to defraud the United States" came in *Dennis v. United States*, 384 U.S.855 (1966), which held that the indictment, alleging that the defendants conspired to obtain the services of the National Labor Relations Board by filing false "non-communist" affidavits, properly charged a Section 371 conspiracy. However, this Court in *Dennis* admonished that

> "indictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable." *Id.* at 860 (citations omitted).

None of these cases supports a Section 371 prosecution when the victim of the conspiracy is a private corporation which is connected to the federal government only by its receipt of a federally guaranteed loan. Indeed, the "interference" or "obstruction" of government functions which are properly punished by Section 371 involve cases in which the defendants have made false statements or claims to a governmental agency, have bribed or colluded with government officials, or have violated obligations im-

posed by federal statute or regulation, either criminal or non-criminal. *E.g., Glasser v. United States,* 315 U.S.60 (1942); *Hammerschmidt v. United States,* 265 U.S.182, 188 (1924). Such is not the case here. The only way that the court of appeals was able to uphold petitioners' convictions under Section 371 was to interpret the phrase "conspiracy to defraud the United States" so that it has no meaning to "men of common intelligence." *Connally v. General Construction Co.,* 269 U.S.385, 391 (1926). *See* Goldstein, *Conspiracy to Defraud the United States,* 68 Yale L.J.405, 455 (1959) (such a reading of Section 371 "imposes an obligation to deal with government [that] is too broad to be understood either by reasonable men or unreasonable public officials").

Indeed, the conduct charged here had *no* direct relationship to the United States, its agencies or lawful functions, and the court of appeals' sanctioning of a Section 371 conviction on these facts does violence to the due process clause of the fifth amendment and the sixth amendment's right "to be informed of the nature and cause of the accusation." The court of appeals' decision also negates a fundamental tenet of criminal law: that no one be punished for conduct which has not been legislatively defined and classed as a crime in advance of its commission. *See, e.g., Lambert v. California,* 355 U.S.225, 228-29 (1957); *Screws v. United States,* 325 U.S.91, 101-02 (1945).

Neither can, as the court of appeals suggests, this Section 371 prosecution be justified because of the government's interest in seeing that " 'the entire project [receiving its aid] is administered honestly and efficiently and without corruption and waste.' " (Pet.App.12-13) (citation omitted). For as Judge Hill states: "[I]n section 371

Congress obviously did not criminalize every conspiracy with the intent or effect of thwarting that objective . . . . " (Pet.App.21) (Hill, J., specially concurring). Thus, expansion of Section 371 to include conspiracies to defraud a private entity receiving a federal loan which entails only a "modicum of federal supervision" of that loan is "patently insufficient to render a fraud upon that [private] entity a fraud upon the United States." *Id.* at 20. *Accord United States v. Porter,* 591 F.2d 1048, 1055 (5th Cir.1979).

B. The Principles of Lenity and Federalism Dictate That a Section 371 Prosecution Cannot Lie in These Circumstances.

In determining the reach of Section 371, this Court should first look to the language of the statute itself. *Perrin v. United States,* 444 U.S.37, 42 (1979). Section 371 punishes a conspiracy to defraud "the United States or any agency thereof in any manner or for any purpose." On its face, the statute does not reach a conspiracy to defraud a private corporation with only tangential connections to the government. Moreover, as previously discussed, the scant legislative history at best "does not demand a broader reading of the statute," *Williams v. United States,* 458 U.S. 279, 288 (1982), and at worst is ambiguous because the Court can do "no more than . . . guess as to what Congress intended." *Ladner v. United States,* 358 U.S.169, 178 (1958). And, any uncertainty as to congressional intent brings into play the rule that "ambiguity concerning the ambit of criminal statutes . . . be resolved in favor of lenity." *Rewis v. United States,* 401 U.S.808, 812 (1971).

In two recent cases with similarities to this one, this Court has invoked the rule of lenity to invalidate federal criminal convictions. In *Williams v. United States,* 458

U.S.279 (1982), the defendant had been convicted of depositing "bad checks" in federally insured banks. Reversing the conviction under 18 U.S.C.§ 1014 (1982), which makes it a crime to render false statements to a federally insured financial institution, the Court held:

> "Given this background—a statute that is not unambiguous in its terms and that if applied here, would render a wide range of conduct violative of federal law, a legislative history that fails to evidence congressional awareness of the statute's claimed scope, and a subject matter that traditionally has been regulated by state law—*we believe that a narrow interpretation of § 1014 would be consistent with our usual approach to the construction of criminal statutes.*" *Id.* at 290 (emphasis added).

Similarly, in *Dowling v. United States,* 105 S.Ct.3127 (1985), this Court held that the National Stolen Property Act did not reach the interstate transportation of "bootleg records:"

> "[T]he Court has stressed repeatedly that ' " ' " 'when choice has to be made between two readings of what conduct Congess has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' " ' " ' " *Id.* at 3132 (citations omitted).

Because the statute did not " '*plainly and unmistakably*' cover petitioner[s'] . . . conduct" and because "the rationale employed to apply the statute to petitioners' conduct would support its extension to significant bodies of law that *Congress gave no indication it intended to touch,*" the Court utilized the rule of lenity to reverse the conviction. *Id.* at 3139 (citations omitted) (emphasis added).

Nothing in the language or sparse legislative history of Section 371 shows that Congress "plainly and unmistakably" intended the statute to apply to a conspiracy to defraud a private corporation. Thus, the rule of lenity is appropriately invoked to bar the Section 371 prosecution here. *See also Liparota v. United States,* 471 U.S. 419 (1985); *United States v. Bass,* 404 U.S.336 (1971).

Closely allied with the rule of lenity is the principle of *federalism* which, as applied here, holds that:

> "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States . . . . In the instant case, *the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources.*" *United States v. Bass,* 404 U.S.336, 349-50 (1971) (footnotes omitted) (emphasis added).

Here, the conduct charged by the government is no more than a violation of a private corporation's internal conflict of interest policies or, at most, a conspiracy to defraud a private corporation. These are matters traditionally left to state criminal law and, indeed, Florida's criminal statutes provide several bases for prosecution of the conduct charged here.[11] Absent proof of clear congres-

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[11] *E.g.,* Chapter 812, Florida Statutes, prohibits "[o]btaining property by fraud, willful misrepresentation of a future act, or false promise." Fla.Stat.§ 812.012(2)(c) (1985); Chapter 895, Florida Statutes, the Florida RICO Act, prohibits conspiracies to commit fraud. Fla.Stat.§ 895.02 (1985); Chapter 817, Florida Statutes, entitled "Fraudulent Practices," prohibits all forms of fraud generally; Chapter 777, Florida Statutes, criminalizes conspiracies "to commit any offense . . . ." Fla.Stat.§ 777.04(3) (1985).

sional intent to extend Section 371 into an area traditionally controlled by state criminal law, Section 371 should not be held to so intrude. *See Williams,* 458 U.S. at 287 (1982) ("federal action was not necessary to interdict the deposit of bad checks, for, as Congress surely knew, fradulent checking activities already were addressed in comprehensive fashion by state law").

C. The Unwarranted Extension of Section 371 to These Facts Would Not Further the Purpose of the Conspiracy Statute and Would Make All Wrongful Conduct, No Matter How Tangential the Relationship to the Government, a Federal Crime.

With little legislative history, we must look to decisions of this Court to discern the purposes of the conspiracy statute. This Court's decisions reveal three governmental interests which Section 371 is designed to protect: (1) the government's interest in not suffering a monetary loss from fraud; (2) the government's interest in performing its lawful functions without obstruction or interference; and (3) the government's interest in compliance with its statutes and regulations. *See, e.g., Dennis v. United States,* 384 U.S.855 (1966). None of these purposes is served by the extension of Section 371 liability to wrongful conduct against a private entity with tangential connections to the government, where the government suffers no loss.

Indeed, if this Court affirms petitioners' convictions, it will be extending Section 371 to almost limitless boundaries. Lower courts will have no basis to decide when a private entity comes under the purview of Section 371 and when it does not. Taken to its logical extreme, *every*

person who engages in any kind of wrongful conduct against a person or entity receiving government assistance, no matter how indirect, or affected by a government program, no matter how slightly, will be subject to a Section 371 prosecution. A new national, all-inclusive criminal code would have been judically created without legislative input, a function this Court has found itself ill-equipped to perform. *Cf. Garcia v. San Antonio Metro. Transp. Auth.,* 469 U.S.528. 546 (1985); *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S.579 (1952).

For example, under the court of appeals' construction of Section 371, if a seller of a residential house and his broker agreed to misrepresent the condition of the house to a buyer and the buyer takes out an FHA or VA loan to purchase the house, this fraud on the buyer would be a conspiracy "to defraud the United States" because of the FHA's or VA's interest in seeing that transactions which those agencies finance are "honest." This would transform a "garden variety" state law fraud prosecution into a federal crime, without any such direction from Congress. *Cf. Sedima, S.P.R.L. v. Imrex Co.,* 105 S.Ct. 3275 (1985). Given that federal programs and policies affect, to some extent, almost all aspects of our citizens' lives, other such examples of federal prosecutions under a Section 371 without limits are easy to imagine.

This Court has recognized that not all wrongful conduct is a federal crime and that:

> "[U]nder our vaunted legal system, no man, however bad his behaviour, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process." *Parr v. United*

States, 363 U.S.370, 394 (1960) (invalidating indictment under federal mail fraud statute).

Accord France v. United States, 164 U.S.676, 682 (1897) ("The statute does not cover the transaction, and, however reprehensible the acts . . . may be . . . , we cannot sustain a conviction on that ground."). Thus, even if it is conceded that these petitioners have engaged in a conspiracy to defraud a private corporation, that conduct should not be held to be a federal crime under Section 371.[12]

II.

SWORN EVIDENCE THAT JURORS WERE UNABLE TO COMPREHEND AND REVIEW THE FACTS AS THE RESULT OF CONSUMING DRUGS AND LARGE QUANTITIES OF ALCOHOL THROUGHOUT THE COURSE OF THE TRIAL REQUIRES AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE DEFENDANTS WERE TRIED BY A JURY CAPABLE OF DECIDING THE CASE ON THE EVIDENCE.

Consistent with the sixth amendment's guarantee of the right to trial "by an impartial jury," this Court has repeatedly recognized that the foundation of our system of criminal justice is the right to a trial before "a jury capable and willing to decide the case solely on the evidence before it . . . ." *Smith v. Phillips*, 455 U.S.209, 217

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[12] If the Court reverses the Section 371 conviction, it should also reverse the mail fraud convictions because the mail fraud counts on their face depended upon proof of a conspiracy to defraud the United States. (J.A.12-15). Faced with the identical situation, the Fifth Circuit, in *United States* v. *Porter*, 591 F.2d 1048, 1058 (5th Cir.1979), reversed both the conspiracy and mail fraud convictions.

(1982). *Accord Parker v. Gladden*, 385 U.S.363, 364 (1966); *Turner v. Louisiana*, 379 U.S.466, 472 (1965); *Irvin v. Dowd*, 366 U.S.717, 722 (1961).

In *Smith v. Phillips*, this Court emphasized that where the impartiality of a juror is challenged, the defendant has a right to an evidentiary hearing to determine whether defendant was afforded a fair trial:

> "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215 (citing *Remmer v. United States*, 347 U.S.227 (1954)).

Remmer involved an attempt to bribe a juror in a criminal income tax case. A post-trial motion for a new trial and a "request for a hearing to determine the circumstances surrounding the incident and its effect on the jury" were denied by the trial court "without holding the requested hearing . . . ." 347 U.S. at 228-29 (footnote omitted). This Court reversed and ordered a hearing at which the government was given the heavy burden of demonstrating that "such contact with the juror was harmless to the defendant." *Id.* at 229. As later summarized in *Smith v. Phillips:*

> "[This] Court [in *Remmer*] instructed the trial judge to 'determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a *hearing* with all interested parties permitted to participate.'" 455 U.S. at 216 (quoting *Remmer*, 347 U.S. at 230) (emphasis in original).

The purpose and importance of a post-trial hearing to investigate an allegation of juror misconduct were emphasized in the concurring opinion in *Smith v. Phillips:*

> "A [post-trial] hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case." 455 U.S. at 222 (O'Connor, J., concurring).

Here, there was sworn evidence that jurors were not able to comprehend and review the facts because of their inebriated condition due to the use of drugs and excessive amounts of alcohol. Nevertheless, the trial judge refused to hold the requested hearing and the court of appeals declined to order one.

The reliance by the court of appeals on the trial court's exercise of "sound discretion" in refusing to hold a hearing is misplaced. Here, the district judge had no opportunity to observe the juror's recitation of what happened during the course of the proceedings, but simply ruled, as a matter of law, that the affidavit on its face was insufficient to require an evidentiary hearing. However, as noted by Justice Cardoza, all that is required to penetrate the privilege of secrecy accorded the conduct of jurors is a *prima facie* showing that misconduct in fact occurred:

> "To drive the privilege away, there must be 'something to give colour to the charge'; there must be 'prima facie evidence that it has some foundation in fact.' When that evidence is supplied, the seal of secrecy is broken." *Clark v. United States*, 289 U.S.1, 15 (1933) (citation omitted).

Cf. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S.548, 557-59 (1984) (Brennan, J., concurring). Certainly, the sworn evidence presented here was sufficient to make a *prima facie* showing so as to require a hearing.

This and other courts have recognized the right to a mentally competent jury. *See, e.g., Jordan v. Massachusetts*, 225 U.S.167 (1912); *Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir.1980) (trial before jury with an insane juror inconsistent with due process). However, the court of appeals' opinion would limit the scope of the sixth amendment's protection to instances involving "'extraneous prejudicial information'" or "'outside influence'" (Pet.App.10)(quoting Fed.R.Evid.606(b)). Under this rationale, if a party discovered after the verdict that a number of the jurors were incompetent or deaf, no evidentiary hearing would be required to determine whether such infirmity rendered them incapable of comprehending the evidence and rendering an impartial verdict because those impairments do not involve "extraneous prejudicial information" or "outside influence." Here, a sworn statement demonstrates that the jurors, by their excessive use of intoxicants and narcotics, were "flying," "messed up," "falling asleep," and clearly unable to comprehend and review the facts in this complex criminal case. (Pet.App. 45-46). To hold that such evidence does not require an evidentiary hearing, much less a new trial, ignores this Court's consistent commitment to the sixth amendment's guarantee of a fair hearing by a panel of impartial jurors "capable and willing to decide the case on the evidence." *Smith v. Phillips*, 455 U.S. at 217.

Moreover, the court of appeals' opinion, which holds that substance abuse (whether occurring in a restaurant or a parking garage or in the jury room itself), does not constitute an "outside influence" under Fed.R.Evid.606

(b), stands alone and is contrary to every case or treatise that has addressed the issue:[13]

> "Rule 606(b) would not render a witness incompetent to testify to jury irregularities such as intoxication . . . regardless of whether the jury misconduct occurred within or without the jury room." 3 J.Weinstein and M.Berger, Weinstein's Evidence ¶606[04], at 606-29 through 606-32 (1985).

To permit convictions to stand in the face of sworn evidence of such gross misconduct, without an evidentiary hearing, violates the sixth amendment's guarantee to a fair trial before an impartial and *competent* jury.

CONCLUSION

For these reasons, petitioners respectfully request the Court to reverse the decision of the Court of Appeals for the Eleventh Circuit and order the court of appeals to remand this case for entry of a judgment of acquittal. Alternatively, the Court should require the district court

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[13] *See, e.g., United States* v. *Taliaferro*, 558 F.2d 724 (4th Cir.1977), *cert.denied*, 434 U.S.1016 (1978) (evidentiary hearing held to determine whether drinks consumed at dinner affected jurors in the performance of their duties); *Jorgensen* v. *York Ice Machine Corp.*, 160 F.2d 432, 435 (2d Cir.), *cert.denied*, 332 U.S. 764 (1947) (L. Hand, J.) (drunkenness and bribery are matters about which jurors may give testimony after the verdict); *Faith* v. *Neely*, 41 F.R.D. 361, 366 (N.D.W.Va.1966) (affidavit claiming one juror was intoxicated caused court to present questionnaire to each juror to determine whether the "juror's faculties were affected and [whether] he could . . . discharge his duties"); *Gamble* v. *State*, 33 So.471, 473 (Fla.1902); 8 Wigmore *Evidence* § 2354, at 703 (McNaughton rev.1961).

to conduct a *Remmer*-type evidentiary hearing on juror misconduct.

Respectfully submitted,

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No. 86-177

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In the Supreme Court of the United States

OCTOBER TERM, 1986

ANTHONY R. TANNER AND WILLIAM M. CONOVER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioners' conduct constituted a conspiracy to defraud the United States within the meaning of 18 U.S.C. 371.

2. Whether the district court erred by denying petitioners' post-verdict motions for a new trial based on allegations of juror intoxication.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-22) is reported at 772 F.2d 765.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1985. A petition for rehearing was denied on June 26, 1986 (Pet. App. 1-2). The petition for a writ of certiorari was filed on August 2, 1986, and was granted on November 3, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

18 U.S.C. 371 provides, in pertinent part, as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the

object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Rule 606(b) of the Federal Rules of Evidence provides as follows:

> *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371 (Count One). Petitioner Conover was also convicted on four mail fraud counts, in violation of 18 U.S.C. 1341 (Counts Two through Five). Petitioner Tanner was convicted on three of the four mail fraud counts (Counts Two, Four, and Five).[1] Pet. App. 8. Each petitioner was sentenced to concurrent 18-month terms of imprisonment on each count. Petitioner Tanner was also fined $10,000.

[1] Tanner was acquitted on Count Three (Pet. App. 13 n.2). An earlier trial of both petitioners had resulted in a mistrial when the jury was unable to reach a verdict (*id.* at 8).

1. Seminole Electric Cooperative, Inc., is a Florida corporation owned by several rural electric cooperatives located in central Florida. Pet. App. 3. During the period at issue in this case, Conover was the manager of Seminole's Procurement Department. In 1979, Seminole borrowed approximately $1.1 billion from the Federal Financing Bank, an agency of the United States Department of the Treasury, in order to build a coal-fired power plant near Palatka, Florida. The loan was guaranteed by the Rural Electrification Administration (REA), an agency of the United States Department of Agriculture, *Id.* at 3-4. Once the REA guaranteed the loan, it acquired all the rights of the noteholder, the Federal Financing Bank, and the REA dealt with Seminole as an agent of the Bank (J.A. 21; 2 Tr. 64; GX 1-H at 1-2).[2]

Construction of the plant began in September 1979. The construction plan called for a transmission line to be built from the plant to a substation located outside Ocala, Florida. To provide access to the area where the transmission line would run, it was necessary to build a 51-mile patrol road. In order to accommodate the construction work, the road had to be made of materials that would support heavy trucks and resist flooding. Pet. App. 4.

On March 24, 1981, Seminole's supervisor of transmission engineering instructed Conover to locate sources of fill material for the patrol road, because Seminole's existing construction contractor was encountering difficulties obtaining sufficient amounts of

[2] The transcript of the trial ("Tr.") is cited by the volume number, where applicable. The testimony of some witnesses was separately transcribed, and those transcript volumes are cited by the name of the witness and the date of the testimony.

suitable fill. After the meeting, Conover telephoned Tanner, who owned a limerock mine, and the two discussed the possibility of using limerock and limerock overburden as an alternative fill material. Pet. App. 4-5.

Conover and Tanner knew each other from prior business dealings. In July 1980, Conover had agreed to buy a condominium from a company owned by Tanner. In January 1981, Conover had contracted to perform landscaping work and to install a sprinkler system at Tanner's condominium complex for approximately $13,750. On March 9, 1981, Tanner had paid Conover $10,035; the money was allegedly a partial payment on the landscaping contract, although a notation on the check described the payment as a "real estate co-broker commission." Pet. App. 5-6; 6 Tr. 74; 16 Tr. 140-141.

At Conover's request, a Seminole engineer examined the fill material available at Tanner's limerock mine and advised Seminole that the material would be adequate for the project. Pet. App. 5. Conover did not investigate any other source of alternative fill materials. *Ibid.* Seminole subsequently issued a purchase order to Tanner's company, Citrus Sand and Clay, Inc., for enough limerock overburden to maintain the construction. *Ibid.*; 3 Tr. 84. When the material first arrived on March 30, 1981, the Seminole engineer who had previously examined the material noticed that it contained considerably more sand than the material Tanner had exhibited at the mine site. 2/17 Pronia Tr. 18; 8 Tr. 89.[8]

[8] Conover prepared two memoranda to support the purchase order to Tanner's Citrus Sand and Clay Co. In an April 8, 1981, memorandum, Conover stated that consulting engineers and Seminole's engineers had examined and approved the delivered material, although neither had done so (2/16 Sherrill Tr. 32; GX 2-D). Nor, contrary to Conover's representations, had the material been tested (*ibid.*). Conover also represented that a certain engineer had recommended that Tanner's limerock mine had suitable material for road construction, although the engineer had not done so. In his memorandum of April 27, 1981, Conover falsely stated that the handbook of the Florida Department of Transportation recommended that a mixture of limestone be used for roadways (5 Tr. 169-170, 171, 174; GX 2-E), and he also falsely stated that an engineer had advised him that Tanner's limestone mine was the closest mine that could provide a limestone mixture (4 Tr. 111-112; GX 2-E).

Seminole subsequently commenced the process of soliciting bids for the construction of the patrol road. Seminole decided to solicit bids on two separate contracts: one to supply fill material, and one to build the road. Pet. App. 6. Both contracts were on REA forms and were paid for with the loan money from the Federal Financing Bank, which was guaranteed by the REA. Under the REA's regulations, only the contract to build the road required the REA's approval (J.A. 24, 29, 30-34; GXs 3-N, 5D). Nevertheless, Seminole employees consulted with an REA official several times about the procedure for bidding that contract as well as the fill contract (J.A. 31-32).

Conover was responsible for adding Tanner's company, Citrus Sand and Clay Co., to the list of companies eligible to bid on the contracts. He represented that Citrus Sand and Clay was experienced in road construction, even though the firm had only recently been incorporated and had not previously done any road building at all. 2/16 Sherrill Tr. 21; 16 Tr. 85-87.

Conover's procurement department prepared the final specifications for the two contracts. The final specifications, which were nearly identical to those

that Conover had received from one of Tanner's engineers (4 Tr. 111-112, 119-120; 5 Tr. 22; GXs 3-A, 3-N), favored Tanner's company in several respects.[4]

Shortly after the bid solicitation was announced, Tanner awarded Conover a management contract to run Tanner's condominium complex. Three days later, Tanner lent Conover $6,000 to permit him to close on the condominium he had previously agreed to purchase from Tanner's company. A notation on the check stated that the payment was a real estate commission. Pet. App. 5; 6 Tr .74; 9 Tr. 48-49, GXs 12-B, 19.

On May 14, 1981, the day after Tanner made the $6000 payment to Conover, Seminole awarded Tanner both contracts for the construction of the patrol road. Pet. App. 6-7. Earlier that spring, Tanner had stated to a third party that he expected to receive the contracts; he commented that he "damn well better * * * because it cost him a condominium" (7 Tr. 187-189).

Conover handled several problems that subsequently arose with Tanner's contracts. When a dispute arose between Seminole and Tanner over the allocation of

[4] First, the requirement of a minimum 20 percent limerock content eliminated several potential bidders who could have supplied a sand and clay mixture. Second, because Tanner's mine was relatively undeveloped, and thus still had a great deal of overburden above the limestone deposits, it was a relatively easy task for him to remove the overburden and then mix in only the minimum amount of limerock necessary to meet the contract specifications. Third, the time for submitting bids was made very short, which eliminated several potential bidders, who did not have time to perform the necessary testing and inspections. Tanner did not face that difficulty, because he was already supplying material at the site on a purchase order basis. Pet. App. 6; 2 Tr. 9-11, 15; 4 Tr. 119, 128-129, 154-155; 5 Tr. 83, 89, 94, 102, 105, 107-108, 110; GXs 3-E, 3-F, 3-G.

certain maintenance costs, Conover advised Seminole that it should pay the costs, which Seminole did. And when the REA notified Seminole that Tanner's bonding company was unacceptable, Conover wrote letters to other bonding companies in which he stated that the road was "essentially" completed, when, in fact, the road was less than half finished. Pet. App. 7.

The patrol road was completed in October 1981. In June 1981, however, before the road was finished, representatives of one of the members of Seminole requested that Seminole terminate all business relations with Tanner, based on alleged improprieties in the awarding of the contracts. Pet. App. 7-8. Following an internal investigation, Seminole suspended and later demoted Conover because of his violation of Seminole's conflict of interest policies (*id.* at 8; J.A. 73-74).

2. The judgments of conviction in this case were entered on March 9, 1984, and sentencing was set for April 20, 1984. The day before sentencing, Tanner filed a motion, in which Conover subsequently joined (J.A. 119), seeking permission to interview the jurors and requesting a new trial (*id.* at 117).[5] The motion was supported by the affidavit of David Best, Tanner's trial counsel, who alleged that Vera Asbel, one of the jurors, had told him that several male jurors had drunk alcohol during the noon recesses in the course of the trial and had slept during the afternoons (*id.* at 247). The district court postponed the sentencing and directed the parties to file memoranda regarding whether they should be per-

[5] Under Local Rule 2.04(c) of the Middle District of Florida, attorneys are barred from contacting jurors unless they move for an order permitting such an interview. Unless good cause is shown, any such motion must be made within ten days after the verdict and must specify the names and addresses of the persons the attorney wishes to interview.

mitted to interview jurors, and if so, what the scope of the interviews should be (*id.* at 119, 123).

On May 30, 1984, the district court held a hearing on petitioners' motion (J.A. 124-176). The court denied the motion on two grounds. First, the court held that the juror's allegations were inadmissible under Fed. R. Evid. 606(b) to impeach the jury's verdict (J.A. 172, 181-182). The court rejected petitioners' claim that their allegations of juror misconduct concerned an improper "outside influence," within the meaning of Rule 606(b), and therefore were excepted from the Rule's prohibition on juror testimony (J.A. 128, 143-144, 152). The court, however, invited petitioners to call any nonjuror witness, including courtroom personnel who had had the opportunity to observe the jury, to testify in support of their motion for a new trial (*id.* at 169, 171). Petitioners declined the invitation, although Tanner's counsel stated that he had seen jurors sleeping on several occasions and that he had once observed a juror in a "giggly mood" (*id.* at 168, 169-171). When the judge reminded counsel that he had previously asked the parties to notify him during the trial if they observed jurors sleeping, counsel responded that he did not "think it was appropriate at the time" and that "[i]t was a boring case [and] * * * hot in here on occasion" (*id.* at 168; see *id.* at 147; 12 Tr. 100-101).

Second, the court disputed the thrust of the allegations of juror misconduct made in attorney Best's affidavit, in his testimony, and in an affidavit of an investigator hired by Best (see J.A. 177-180). The judge stated that he had an unobstructed view of the jury during the lengthy trial and had not observed any sign that any juror was sleeping or anything else to suggest juror intoxication, and that if anyone had reported such behavior, he would have remedied the problem at the time (*id.* at 148-149, 167-172).

The judge also emphasized that courtroom employees had in the past reported any jury problems they observed, but that "[n]othing was brought to my attention in this case about anybody appearing to be intoxicated or being intoxicated" (*id.* at 171-172). The judge concluded that based on his observations he was satisfied that the motion to interview the jurors should be denied (*id.* at 173; see *id.* at 181-182).

Notwithstanding the court's order that the parties not interview the jurors, attorney Best spoke with a second juror, Daniel Martin Hardy, on two occasions approximately five months later while this case was on appeal. Best first spoke with Hardy when Hardy purportedly showed up at Best's home unannounced. Best spoke with him a second time when Best telephoned Hardy two days later and arranged for a formal transcribed interview to be conducted by an employee of Best's law firm (Pet. App. 25-27; J.A. 241-242). On neither occasion did Best seek leave of court for the interview. Instead, Best attached the product of the formal interview, an affidavit signed by Hardy, to a second motion for a new trial or for an evidentiary hearing to interrogate the jurors concerning possible juror misconduct (see J.A. 203). In the affidavit, Hardy alleged that several jurors drank beer and smoked marijuana during the luncheon recesses (Pet. App. 27, 29, 31-32, 36-39). He also alleged that two jurors had occasionally ingested cocaine during the luncheon recess (*id.* at 40, 44, 45). Hardy stated that the drinking and drug use had affected his "reasoning ability" one day in the middle of the trial (*id.* at 55) and that the two principal drug users had fallen asleep during the trial (*id.* at 46). The district court denied the second motion on the same grounds that it had denied the first (J.A. 255-258).

3. The court of appeals affirmed (Pet. App. 3-16). The court rejected petitioners' claim that the district court erred in refusing to conduct an evidentiary hearing that included examination of the jurors (*id.* at 8). The court concluded that the affidavit did not "allege that prejudicial information was brought to the jury's attention [or] * * * that any outside influence was brought to bear upon any juror" (*id.* at 10). Accordingly, the court concluded, no evidentiary hearing was warranted (*ibid.*, citing Fed. R. Evid. 606(b)). The court added that "[e]ven if the allegations of substance abuse were true, [petitioners had not made an] 'adequate showing of extrinsic influence to overcome the presumption of juror impartiality'" (*ibid.*, quoting *United States* v. *Barshov*, 733 F.2d 842, 851 (11th Cir. 1984), cert. denied, 469 U.S. 1158 (1985)). Finally, the court rejected petitioners' claim that the indictment failed to charge and the evidence at trial failed to prove a conspiracy "to defraud the United States" within the meaning of 18 U.S.C. 371. Pet. App. 10-13.

SUMMARY OF ARGUMENT

1. Petitioners' conduct constituted a conspiracy to defraud the United States, within the meaning of 18 U.S.C. 371. Section 371 makes unlawful a conspiracy to defraud an agency of the United States "in any manner or for any purpose," which includes "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Haas* v. *Henkel*, 216 U.S. 462, 479 (1910). Petitioners' conspiracy defrauded the United States because it undermined the REA's rural electrification program, which was being implemented by Seminole with federal money and under the REA's direct supervision.

Section 371 does not require proof that the defendants' conduct resulted in a pecuniary loss to the United States or that it violated any other federal law. Nor must the United States be the immediate object of the fraud. In any event, however, petitioners' conspiracy exposed the United States to pecuniary loss by diverting federal funds, by causing pecuniary injury to Seminole, which was responsible for repaying the federal loan, and by violating federal requirements that were designed to ensure meaningful and substantial REA supervision over Seminole's use of the federal loan proceeds.

A fraud against a private entity constitutes a fraud against the United States when the private entity is an intermediary which, pursuant to contract or statute, is in effect acting on behalf of the federal government. In this case, Seminole was an intermediary performing the federal function of using federal funds to bring electric power to rural areas. Where, as in this case, one of the conspirators is employed by the private entity and has official responsibilities for the implementation of the federal program, the federal nature of the fraud is undeniable.

2. The district court did not abuse its discretion in denying petitioners' motions for a new trial without holding an evidentiary hearing to interrogate the jurors. In considering Fed. R. Evid. 606(b), Congress faced the very issue presented in this case—whether jurors should be permitted to testify, after reaching their verdict, concerning allegations of juror intoxication. Congress concluded that the overall risk to the jury system of allowing such testimony outweighs the benefits to litigants in isolated cases from permitting such inquiries. Rule 606(b) therefore prohibits juror testimony for the purpose of impeaching the jury's verdict, with two limited exceptions: to determine "whether extraneous prejudicial information was improperly brought to the jury's

attention" and to determine "whether any outside influence was improperly brought to bear upon the jury." As the legislative history of Rule 606(b) makes clear, neither of these exceptions applies to allegations, such as those in this case, that a juror voluntarily ingested alcohol or drugs.

The policy underlying Rule 606(b) and the restrictive common law rule on which it is based is a sound one. Permitting jurors to be called, after verdict, to testify about the behavior of other jurors during the trial would invite the harassment of jurors and the risk of manipulation of the jury system by unscrupulous litigants. Although juror interrogation might seem justified in a particular case, the instances in which juror interrogation will disclose a disturbing degree of juror intoxication or inattentiveness are too rare to justify the risk of harassment and manipulation that would likely accompany a system permitting juror interrogation whenever a defendant makes a colorable claim of misconduct within the jury.

Even if Rule 606(b) did not preclude juror testimony concerning petitioners' allegations of juror intoxication, the district court would not have abused its discretion in denying petitioners' motions. The thrust of petitioners' allegations accompanying both its first and second motions was juror inattentiveness due to intoxication. The court properly discounted the allegations based on its own observations of the jury during the trial, as well as the failure of any of the parties or any of the courtroom employees to report any apparent misconduct or inattentiveness by any of the jurors. The court was also entitled to ignore the juror's affidavit filed in support of petitioners' second motion, because that affidavit was the product of petitioners' violation of the court's order barring interviews of any juror without prior judicial

approval. For those reasons, the court was not required to resort to the extraordinary step of interrogating jurors.

Finally, the Sixth Amendment does not require a trial court to allow interrogation of jurors in response to allegations of juror intoxication. Evidentiary hearings are required in cases involving claims of extrinsic influence, because those claims involve violations of the sanctity of the jury and because they are usually susceptible to evaluation only through a hearing. By contrast, allegations of juror incompetence or inattentiveness necessarily touch on matters more internal to the jury's decisionmaking process. In addition, they are more often reflected in juror behavior that is observable during the trial, either by the judge, by counsel, by court personnel, or by other members of the jury who may report the matter to the court before the trial ends. For these reasons, the Sixth Amendment does not mandate juror interrogation with respect to allegations of juror misconduct of the kind made by petitioners in this case.

ARGUMENT

I. PETITIONERS' CONDUCT CONSTITUTED A CONSPIRACY TO DEFRAUD THE UNITED STATES IN VIOLATION OF 18 U.S.C. 371

Petitioners argue that while they may have committed a fraud upon Seminole or violated its internal conflict of interest policies, they did not defraud the "United States, or an[] agency thereof," within the meaning of 18 U.S.C. 371. The fraud in this case, however, resulted in a direct injury to the REA's rural electrification program, which was being implemented by Seminole with federal money and under the REA's direct supervision. The happenstance that Seminole was the immediate victim of petitioner's fraudulent activities does not place petitioners' conduct outside the reach of Section 371.

A. Petitioners Violated Section 371 By Conspiring To Interfere With And Obstruct The Lawful Functions Of The REA

1. The language of Section 371 is broad. It makes unlawful a conspiracy to defraud the United States or a federal agency "in any manner or for any purpose." The statute contains "no words of limitation whatsoever and no limitation that could be implied from the context." *United States* v. *Cohn*, 270 U.S. 339, 346 (1926); see *United States* v. *Yermian*, 468 U.S. 63, 71 (1984).

Based on the breadth of the statutory language, this Court has rejected the argument that the term "defraud" in Section 371 is confined to its common law meaning. *Dennis* v. *United States*, 384 U.S. 855, 861 (1966); *United States* v. *Keitel*, 211 U.S. 370, 393 (1908). Instead, the Court has repeatedly concluded, "the statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Haas* v. *Henkel*, 216 U.S. 462, 479 (1910); see *Dennis* v. *United States*, 384 U.S. at 861; *Glasser* v. *United States*, 315 U.S. 60, 66 (1942); *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924).

Petitioners' conduct fell within Section 371 because it impaired the lawful function of the REA, a federal agency. For the purpose of self-enrichment, petitioners corrupted the implementation of a federal project sponsored and supervised by the REA. They did so by engaging in collusive bidding practices that were designed to circumvent the federal requirement that contracts be awarded to the lowest responsible bidder, and by making fraudulent misrepresentations that interfered with the ability of the federal government to supervise the project. As a result of their fraudulent conduct, petitioners impaired the REA's

ability to ensure the achievement of federal objectives and to protect federal property interests.

2. Ever since President Roosevelt established the REA in 1935 and Congress enacted the agency's organic legislation one year later,[6] the REA has achieved dramatic success in promoting rural electrification by making or guaranteeing loans to private and public intermediaries and by then carefully supervising their expenditure of the loan monies. See generally 11 N. Harl, *Agricultural Law* §§ 98.01-98.06 (1986); REA, *A Brief History of the Rural Electric and Telephone Programs* (1985). The federal interest in the proper expenditure of the $1.1 billion loan proceeds in this case was safeguarded by provisions in the loan agreement and in REA Bulletins and REA memoranda to loan recipients (see J.A. 60). REA rules and regulations provided for substantial ongoing federal supervision of the project, including management takeover should a default occur (*id.* at 62). The regulations also provided for protection of the government's security interest in the property (*id.* at 66).[7] In particular, pursuant to the loan contract, Seminole was required to ensure that the loan monies were expended "only for such of the purposes specified in the statement of purposes * * * as shall have been approved by [the REA]"

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[6] See Exec. Order No. 7037 (May 11, 1935); Act of May 20, 1936, ch. 432, 49 Stat. 1363, 7 U.S.C. 901 *et seq.*; see also Act of Apr. 8, 1935, ch. 48, 49 Stat. 115 *et seq.*

[7] The mortgage (GX 1-H) also protected the government's interest in the property by requiring Seminole not to encumber any property that was subject to the lien of the mortgage (*id.* at 7), to maintain the mortgaged property in good repair and condition (*id.* at 8), to secure various types of insurance to protect the property (*id.* at 10-12), and not to employ any individual as a general manager without the REA's prior approval (*id.* at 16).

(*id.* at 59) and that the system was constructed by responsible contractors, ordinarily "the lowest responsible bidder" (*id.* at 60, 61). The REA also required Seminole to obtain the agency's approval prior to letting out certain contracts (*id.* at 65, 68, 80-81) and to follow specified REA procedures (*i.e.*, formal bidding, informal bidding, informal quotes) in awarding all contracts; the specific procedure required depended on the type of contract involved (see *id.* at 83, 105-108). The stated purposes of the REA contract approval and bidding requirements included "protecting the security interests of the Government's loans" and ensuring that "the costs of construction, materials, and equipment [were] reasonable and within the limits of economic feasibility" (*id.* at 77; see 2 Tr. 63; 2/22 Wright Tr. 69). Hence, even if REA prior approval was not required, the REA reserved the right to challenge contracts that were later submitted for review (J.A. 24-27). Finally, the loan contract required Seminole to warrant that every statement, certificate, and opinion "submitted to the Government by it or in its behalf [would be] true and correct" (*id.* at 68).

The funds for the two contracts that were the subjects of petitioners' fraud originated in REA's guaranteed loan (see J.A. 24), and at least one of the two contracts required prior REA approval (*id.* at 32, 42-45). Both contracts were subject to REA's supervision: Seminole was required to follow REA procedures in awarding each contract (see *id.* at 108), and the failure to do so could be the basis of REA's declaring Seminole in default. Nor was REA's involvement in the contracts only theoretical. Seminole employees consulted an REA official on several occasions about the bidding procedures on the two contracts (*id.* at 31-32; see also *id.* at 24-28; 2 Tr. 57-64).

The necessary effect of petitioners' corrupt practices was to interfere with Seminole's ability to comply with REA contractual requirements and with the REA's ability to supervise Seminole's administration of the federal funds. As a result, the fraud interfered both with the accomplishment of federal objectives and with the protection of federal property. In short, petitioners' conspiracy had the effect of "interfer[ing] with or obstruct[ing]" the REA's "lawful * * * functions by deceit, craft or trickery" (*Hammerschmidt* v. *United States*, 265 U.S. at 188) and therefore violated Section 371.

Petitioners' contention that Section 371 does not apply to their fraudulent activities rests on two propositions. First, they argue (Br. 17, 22) that Section 371 does not apply because their activities did not cause the federal government any pecuniary loss and did not violate any other federal statute or regulation. Second, they contend (Br. 16-17, 24-25, 27-28) that while they may have committed a private fraud upon Seminole, the project was not sufficiently "federal" to come within the scope of the federal statute. Neither argument is persuasive.

B. Section 371 Does Not Require Proof Of Pecuniary Loss Or A Violation Of Another Provision Of Federal Law

1. It has long been settled that the government need not demonstrate pecuniary loss to obtain a conviction under Section 371. See, *e.g.*, *Haas* v. *Henkel*, 216 U.S. at 479; *United States* v. *Keitel*, 211 U.S. at 394; *Hyde* v. *Shine*, 199 U.S. 62, 81-82 (1905). "[D]efrauding the government of its right and its facilities for rendering a proper service to the people * * * cuts deeper than defrauding the government of a wheelbarrow, and it is unquestionably within the

power of the government to protect itself against that kind of a fraud." *Curly* v. *United States*, 130 Fed. 1, 9 (1st Cir.), cert. denied, 195 U.S. 628 (1904); see *United States* v. *Bradford*, 148 Fed. 413, 421-422 (E.D. La. 1905), aff'd, 152 Fed. 616 (5th Cir.), cert. denied, 206 U.S. 563 (1907) ("It is certainly just as important that the government should not be defrauded with regard to its operations, even if no pecuniary value is involved, as that it should not be defrauded of its property. * * * [I]t would be astonishing, indeed, if Congress had failed to afford protection against such frauds.").

There is likewise nothing to support petitioners' claim that their convictions must be overturned because their conduct did not violate any federal statutory or regulatory requirement. Section 371 by its terms does not require proof of a violation of any other federal law,[8] and this Court has not required that the means used to do so violate any other federal law. It is enough, the Court has said, that the defendants agree to interfere with or obstruct a lawful governmental function "by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention." *Hammerschmidt* v. *United States*, 265 U.S. at 188.[9]

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[8] The statute is written in the disjunctive. The first portion, which is the general federal conspiracy statute, requires proof of an agreement to commit a federal offense. The second portion, which prohibits conspiracies to defraud the United States, contains no such requirement.

[9] It is, of course, unnecessary to show that the defendants knew or intended that the United States would be the victim of their fraudulent conduct. It is enough that they willfully conspired to engage in fraudulent conduct and that the United States was in fact a victim of the fraud. See *United States* v. *Feola*, 420 U.S. 671, 687-688 (1975).

2. Even under petitioners' narrow reading of Section 371, their fraudulent conduct would fall within the statutory prohibition. Petitioners' conspiracy to defraud risked pecuniary loss to the federal government and violated federal requirements established by its contract with Seminole.

Petitioners' fraudulent conduct plainly increased the risk of financial loss to the federal government. The $1.1 billion loan for the project consisted of federal funds, and the loan was guaranteed by the REA, a federal agency. The fraudulent diversion of the project funds thus constituted a diversion of federal loan monies. In addition, the fraudulent diversion of funds from the project increased the risk that Seminole would be unable to complete the project within the amount budgeted and thus would default on the loan. The proper use of the federal funds as well as the security of the government's investment in the project therefore depended on the honest administration of the loan proceeds.

The government proved at trial that pursuant to petitioners' conspiracy, Conover failed to explore alternative construction techniques (Pet. App. 5) and drew up contract specifications to ensure that Tanner would be awarded the contract (*id.* at 6), thereby precluding other more qualified and lower cost businesses from receiving the contract (*ibid.*). Moreover, because Tanner's fill material proved inadequate for the job, Seminole had to purchase from Tanner a supplemental fill material ("clear sand") at a price higher than others had been willing to charge (*id.* at 7). In addition, Conover advised Seminole to re-

solve a contract dispute over costs in Tanner's favor (*id.* at 6), and he misrepresented Tanner's progress on the contract to bonding companies (*id.* at 7).[10]

As we have noted, petitioners' fraudulent conduct also violated several federal requirements established by the loan agreement and mortgage with Seminole and further detailed in REA bulletins and memoranda to recipients of REA loan guarantees. For instance, the corrupt bidding practices engaged in by petitioners flatly violated the REA bidding requirements (see J.A. 60-61, 83, 105-108) and the REA requirement that Seminole warrant that its statements to the REA would be "true and correct" (*id.* at 68). Although REA policy provided Seminole with the option of using either informal competitive bidding or informal quotes in the awarding of the particular contract at issue in this case (see *id.* at 32, 83), neither option sanctioned the collusive and deceitful practices petitioners employed. Those federal policies were designed, of course, to protect the federal interest in the project against precisely the kind of misconduct that is at issue in this case. Thus, petitioners are mistaken in asserting that their conspiracy did not fall within Section 371 because it did not offend any specific federal regulations or policies.

C. Section 371 Does Not Require Proof That The United States Was The Immediate Object Of Petitioners' Fraudulent Activities

1. Petitioners' second principal defense—that the REA project was not sufficiently "federal" in character to fall within the scope of Section 371—is similarly without merit. It is no bar to prosecution under Section 371 that a federal agency is not the immediate object of the fraud. Indeed, even under the common law of fraud, the false representation "need not be made directly by the defendant to the victim. A conviction may be had where the accused causes the representation to reach the victim through the intervention of an innocent third person or persons, or where the representation is made to and the property obtained from one person, though the loss falls upon a third person and the intent was to defraud him." II H. Brill, *Cyclopedia of Criminal Law* § 1244, at 1892 (1923) (footnotes omitted). The scope of Section 371, moreover, is even broader than the common law crime.

To be sure, the classic case of conspiracy to defraud the United States within the meaning of Section 371 occurs when the conspirators are dealing directly with the federal government, particularly when one conspirator is a federal employee with official responsibilities. See, *e.g.*, *Mammoth Oil Co.* v. *United States*, 275 U.S. 13, 35-36 (1927); *Crawford* v. *United States*, 212 U.S. 183 (1909); *Carter* v. *McClaughry*, 183 U.S. 365, 367-368 (1902). It is well settled, however, that it is no less a fraud upon the federal government when the immediate object of the fraud is an intermediary which, pursuant to a contractual undertaking or by statutory design, is in effect acting on behalf of the federal government. Decisions of this Court involving Section 371 prosecutions reflect this understanding of the statute's scope (see *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949) (Section 371 prosecution premised on subcontractor fraud upon a general contractor of the

[10] It is no answer that petitioners' fraud was small in comparison to the size of the project. There is no *de minimis* defense to fraud charges; the diversion of $10,000 from a $10,000,000 project is no different analytically from the diversion of $10,000 from a $100,000 project.

Navy)) as do numerous decisions of this Court construing related statutory provisions. See *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976) (False Claims Act); *United States* v. *Hess*, 317 U.S. 537, 541-545 (1943) (same);[11] *Dixson* v. *United States*, 465 U.S. 482, 496-500 (1984) (federal bribery statute). In addition, numerous court of appeals decisions have upheld Section 371 prosecutions when the immediate object of the fraud has been a non-federal public or private intermediary responsible for administering a federally sponsored program.[12]

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[11] Because the False Claims Act is not as broad as Section 371, fraudulent conduct barred by the former should invariably be prohibited by the latter.

[12] See, *e.g.*, *United States* v. *Lane*, 765 F.2d 1376, 1378-1380 (9th Cir. 1985) (immediate object of contract fraud a state agency administering federal Social Security Title IV(A) and Title XX funds to train state employees providing community services); *United States* v. *Pintar*, 630 F.2d 1270, 1274-1275, 1277-1278 (8th Cir. 1980) (fraud in grant application processing upon federally funded regional commission designed to encourage economic development in parts of the upper middle west); *United States* v. *Burgin*, 621 F.2d 1352, 1354-1357 (5th Cir.), cert. denied, 449 U.S. 1015 (1980) (contract fraud upon state agency responsible for administering federal Title XX funds to provide services to various Head Start centers); *United States* v. *Anderson*, 579 F.2d 455, 457-458 (8th Cir.), cert. denied, 439 U.S. 980 (1978) (contract fraud upon county agency administering federal highway funds); *United States* v. *Hay*, 527 F.2d 990, 992-993, 997-998 (10th Cir. 1975), cert. denied, 425 U.S. 935 (1976) (loan agreement fraud upon foreign government (South Vietnam), which was lent federal money to finance a new water system); *United States* v. *Del Toro*, 513 F.2d 656, 658 (2d Cir.), cert. denied, 423 U.S. 826 (1975) (contract fraud upon city agency responsible for administering federal Department of Housing and Urban Development project); *United States* v. *Thompson*, 366 F.2d 167, 169, 171-173 (6th Cir. 1966), cert. denied, 386 U.S. 945 (1967) (contract fraud upon federally financed county hospital); *Harney* v. *United States*, 306 F.2d 523, 525-526 (1st Cir.), cert. denied, 371 U.S. 911 (1962) (condemnation appraisal fraud upon state agency receiving federal highway funds); *Langer* v. *United States*, 76 F.2d 817, 824 (8th Cir. 1935) (fraud upon state relief committee responsible for distribution of federal relief funds); *United States* v. *Furer*, 47 F. Supp. 402, 407 (S.D. Cal. 1942) (contract fraud upon private company responsible for administering federal funds in contracting for construction of military tools and parts); see also *United States* v. *Wheadon*, 794 F.2d at 1279-1280, 1282-1283 (fraud upon state agency disbursing HUD funds a conspiracy "to defraud the United States," within meaning of False Claims Act, 18 U.S.C. 286).

Where, as in this case, one of the conspirators is employed by the intermediary and has official responsibilities in the implementation of the federal program, including the disbursement of funds originating with the federal government, the federal nature of the fraud is virtually undeniable. See, *e.g.*, *United States* v. *Lane*, 765 F.2d 1376, 1378-1380 (9th Cir. 1985); *United States* v. *Anderson*, 579 F.2d 455, 457-458 (8th Cir.), cert. denied, 439 U.S. 980 (1978); *United States* v. *Del Toro*, 513 F.2d 656, 658 (2d Cir.), cert. denied, 423 U.S. 826 (1975); *United States* v. *Harding*, 81 F.2d 563, 564-567 (D.C. Cir. 1936); *United States* v. *Furer*, 47 F. Supp. 402, 407 (S.D. Cal. 1942). Cf. *Dixson* v. *United States*, 465 U.S. 482 (1984); *United States* v. *Wheadon*, 794 F.2d 1277, 1279-1283 (7th Cir. 1986).[13] Hence, in

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[13] Under this Court's analysis in *Dixson*, petitioner Conover would likely qualify as a "public official" within the meaning of the federal bribery statute, 18 U.S.C. 201(a). Cf. *United*

this case, as in *United States* v. *Hess*, 317 U.S. at 544, "[t]he fraud * * * [w]ould not have been any more of an effort to cheat the United States if there had been no * * * intermediary."

D. Neither The Rule Of Lenity Nor Principles Of Federalism Compel A Narrower Construction Of Section 371

Contrary to petitioners' claim, upholding the convictions in this case does not depend on a construction of Section 371 with "almost limitless boundaries" (Br. 28). Our interpretation of the statute is consistent with the settled judicial construction of the law as reflected both in the decisions of this Court and in decades of lower court decisions.

We fully agree that the government must establish some injury to the United States to prove a violation of Section 371. We assert only that, as this Court has repeatedly held, it is sufficient that the government prove that injury by demonstrating that the

States v. *Wheadon*, 794 F.2d at 1282-1283. Like the private employee in *Dixson*, Conover's official duties as procurement officer for Seminole "directly influenced the expenditure of federal funds" (465 U.S. at 499). And, like the private employee in *Dixson* (see *id.* at 485), Conover used his official position to extract kickbacks from a contractor (Tanner) seeking work. To be sure, it is not a prerequisite to a successful prosecution under Section 371 that a member of the conspiracy occupies an employment position with the intermediary that renders the conspirator the equivalent of a "public official" for the purposes of the federal bribery law (see, *e.g.*, *United States* v. *Del Toro*, 513 F.2d at 663-664, 658). Where, however, a member of the conspiracy is an official acting on behalf of the United States, the conclusion is inescapable that the fraudulent conduct constitutes a conspiracy "to defraud the United States" within the meaning of Section 371.

conspiracy contemplated interference with or obstruction of lawful federal functions.

Our construction of Section 371 would not mean, as petitioners claim (Br. 28-29 (emphasis in original)), that "*every* person who engages in any kind of wrongful conduct against a person or entity receiving governmental assistance, no matter how indirect, or affected by a government program, no matter how slightly, will be subject to a Section 371 prosecution." Plainly, Section 371 does not apply to fraudulent conduct against any entity that receives some amount of federal financial assistance or is subject to some form of federal regulation. Cf. *Dixson*, 465 U.S. at 499.[14] Instead, there must be substantial

[14] Petitioners suggest (Br. 29) that the court of appeals' construction of Section 371 would improperly reach cases of fraud committed by a broker and seller against a buyer who takes out a Federal Housing Authority or Veterans Administration loan. In fact, a fraud committed by a broker and seller that is designed to result in the buyer's obtaining a federally guaranteed loan that would not otherwise be available falls squarely within the reach of Section 371. See *Heald* v. *United States*, 175 F.2d 878, 880 (10th Cir.), cert. denied, 338 U.S. 859 (1949) ("Concealing [by the broker and seller] of the actual selling price for the purpose of obtaining a [VA] guaranteed loan which could not be obtained were such price known, impairs the functions of the Veterans Administration and conspiracy to do so states an offense against the United States."); see also *Ross* v. *United States*, 180 F.2d 160, 163-165 (6th Cir. 1950); *McClanahan* v. *United States*, 230 F.2d 919, 921-922 (5th Cir.), cert. denied, 352 U.S. 824 (1956). In any event, in this case one of the conspirators was employed by the entity that was the immediate object of the fraud, and in that capacity he was directly responsible for the disbursement of the funds received from the federal government. Hence, the more appropriate analogy would be to a fraud committed by a bank official and a borrower to obtain a federally guaranteed loan through the bank. Without question, Section 371 would make unlawful a conspiracy that

ongoing federal supervision of the defrauded intermediary or delegation of a distinctly federal function to that intermediary to render a fraud upon the intermediary a fraud upon the "United States," within the meaning of Section 371.[15] In this case, both of those factors are present. Section 371 thus unambiguously extends to conduct such as petitioners', and the rule of lenity therefore does not call for a narrower construction that would remove them from the reach of the statute. See *Dixson* v. *United States*, 465 U.S. at 500 n.19; *United States* v. *Moore*, 423 U.S 122, 145 (1975); *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974).[16]

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embraced such fraudulent conduct. See, *e.g.*, *United States* v. *Levinson*, 405 F.2d 971, 975-976, 981-986 (6th Cir. 1968), cert. denied, 395 U.S. 958 (1969) (VA guaranteed loans); see also *United States* v. *Del Toro*, 513 F.2d at 658.

[15] Petitioners' reliance (Br. 20-21) on *United States* v. *Gradwell*, 243 U.S. 476 (1917), and *Hammerschmidt* v. *United States*, 265 U.S. 182 (1924), is misplaced. In *Gradwell*, it was clear that Congress did not intend Section 371 to apply at all to elections, including election fraud, with which Congress had exhaustively dealt elsewhere (see 243 U.S. at 481-485). In *Hammerschmidt*, it was equally clear that the words "to defraud" were not so broad as to encompass individuals advocating that others defy federal draft laws. In this case, however, petitioners' fraudulent conduct is at the core of traditional fraud—corruption in the award of contracts—and petitioners' conspiracy obstructed the REA's rural electrification project.

[16] Petitioners also suggest in passing (Br. 16, 24) that applying Section 371 to them would violate their rights under the Due Process Clause of the Fifth Amendment. This constitutional claim was not raised in the district court or in the court of appeals in the first instance, and petitioners made only oblique references to it in their petition for rehearing below (at 10) and in their petition for a writ of certiorari (at 15). The issue is therefore not properly before this Court.

Petitioners' reliance (Br. 27-28) on "principles of federalism" is also unpersuasive. Petitioners claim (*id.* at 27) that our construction of Section 371 would render "traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources." The construction of Section 371 we propose is not so sweeping. There is a strong federal interest in prosecuting individuals for corrupt misuse of federal funds. See *Dixson*, 465 U.S. at 500-501. Where federal funds or federal programs are victimized by fraud, it is entirely appropriate to rely on federal law to remedy the problem. The mere presence of an intervening private entity that is disbursing the federal funds or operating the federal program does not convert an essentially federal program into a matter of exclusive state and local concern.

As the REA loan agreement at issue in this case makes plain, it is often critically important to the success of federal programs that the power to choose among potential contractors remain free of corruption. For this reason, the federal government often maintains a substantial federal presence even when it has left the implementation of federal objectives to nonfederal entities that the federal government has financed. There is nothing "intrusive" about interpreting federal criminal law to protect federally financed and supervised projects from corruption. Certainly, the federal interest in such projects is sufficient to ensure that principles of federalism are not of-

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See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, their conduct occurred after the Fifth Circuit's decision in *United States* v. *Burgin*, 621 F.2d 1352 (1980), a case similar to this one; at least as of that time petitioners were on notice that they were subject to federal prosecution.

fended by permitting the United States to exercise concurrent jurisdiction over fraudulent conduct in the operation of the projects.[17]

II. PETITIONERS ARE NOT ENTITLED TO A HEARING TO QUESTION JURORS ABOUT ALLEGATIONS OF ALCOHOL AND DRUG USE DURING THE TRIAL

The strength of the jury system—its reliance on peer judgment—is also the source of its frailty. Jurors are ordinary citizens. They are not specially selected arbiters or trained experts, and they are not expected to give an accounting of the reasons for their verdicts. Recognizing the special nature of the jury process, courts and legislatures historically have allowed only limited inquiry into the way the jury conducts its affairs. In particular, out of respect for juror privacy and to prevent juror harassment and tampering, the courts have largely prohibited post-

[17] Petitioners argue (Br. 30 n.12) that if the Court overturns their convictions on the Section 371 count, it must also reverse their mail fraud convictions. We do not believe that is so. The mail fraud charges were based not only on the fraud against the United States, but also on the fraud against Seminole (J.A. 12-15). Moreover, the court's jury instructions on the mail fraud counts focused exclusively on the private fraud as the basis for those charges (see 18 Tr. 21-26). In any event, even if the jury based its mail fraud verdicts on the fraud against the United States, the jury could not have found that the United States was defrauded without also finding that Seminole was defrauded. Therefore, regardless of the disposition of the Section 371 count, petitioners' convictions on the mail fraud counts can be upheld. Because the mail fraud counts can be sustained without the need for a new trial, the Court should reach the jury misconduct issue in this case even if it rules in petitioners' favor on the Section 371 issue.

verdict interrogation of jurors as a means of impeaching jury verdicts.

Petitioners invite this Court to depart from that practice and to expand the grounds for impeachment of verdicts and interrogation of jurors. The invitation should be declined. Congress considered the very issue presented by this case when it enacted Rule 606(b) of the Federal Rules of Evidence in 1975. At that time, Congress rejected proposals to expand the grounds for post-trial impeachment of jury verdicts, and in our view the Sixth Amendment does not displace that congressional judgment. Accordingly, we submit that the district court did not abuse its discretion in declining to grant petitioners' motions for a new trial or an evidentiary hearing to interrogate jurors for impeachment purposes.

Contrary to petitioners' contention (Pet. i; Br. i), this case does not present the question whether petitioners are entitled to an evidentiary hearing concerning their allegations of juror misconduct. The district court held a limited evidentiary hearing on the first motion, at which Tanner's counsel testified. At that time, the district court invited petitioners to call any witness, other than a juror, or to offer any other evidence that might support their allegations of juror misconduct (see J.A. 169-171).

Petitioners were not satisfied with that kind of hearing. Instead, the focus of both of their post-trial motions was to request a hearing at which they could interrogate the jurors (J.A. 113-117, 203). The district court's rulings denying petitioners' requests were directed to that aspect of their motions (*id.* at 125, 181-182, 255-258). The court concluded that Fed. R. Evid. 606(b) barred the introduction of juror testimony regarding the allegations of juror

misconduct, but that, in any event, the court's opportunity to observe the jury during the lengthy trial obviated any need for the extraordinary remedy of juror interrogation (*id.* at 147-149, 167-173). Accordingly, the question presented by this case is whether the district court erred in refusing to allow petitioners to interrogate the jurors, either in an evidentiary hearing or in some other setting.

A. Rule 606(b) Bars Juror Testimony About Alleged Juror Intoxication During The Trial

1. The common law flatly prohibited the introduction of juror testimony to impeach a jury verdict. See *Vaise* v. *Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785); 8 J. Wigmore, *Evidence* § 2352, at 696 (McNaughton rev. ed. 1961). The common law rule was accepted in the United States with what Wigmore termed "an adherence almost unquestioned" (*id.* at 697 (footnote omitted)).

The broad common law prohibition against juror testimony has not been significantly diluted in this country during the last 200 years. This Court has fashioned exceptions to the rule in only limited circumstances. The Court has allowed post-verdict juror testimony to explore the prejudicial effect of the introduction into the jury room of information not admitted into evidence. See, *e.g.*, *Mattox* v. *United States*, 146 U.S. 140, 151 (1892); see also *United States* v. *Reid*, 53 U.S. (12 How.) 361, 362-363 (1851). The Court has also permitted inquiry into jurors' associations with outside parties that might affect their impartiality. See *Rushen* v. *Spain*, 464 U.S. 114, 116, 121 (1983); see also *Smith* v. *Phillips*, 455 U.S. 209, 213-214, 215, 217 (1982). And the Court has permitted jurors to be questioned about efforts by outsiders to influence the jury by bribery,

threats, or expressions of opinion. See *Parker* v. *Gladden*, 385 U.S. 363, 363-364 (1966); *Remmer* v. *United States*, 347 U.S. 227, 228-230 (1954); *Mattox* v. *United States*, 146 U.S. at 150. Beyond those limited settings, however, the Court has repeatedly adhered to the traditional rule against admitting juror testimony for the purpose of impeaching the jury's verdict. See, *e.g.*, *McDonald* v. *Pless*, 238 U.S. 264, 267-269 (1915); *Hyde* v. *United States*, 225 U.S. 347, 384 (1912).

In the leading case of *McDonald* v. *Pless*, 238 U.S. at 267-268, the Court explained in detail the justification for precluding juror testimony even when the allegations, if proved, would provide grounds for a new trial:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

See also *Clark* v. *United States*, 289 U.S. 1, 13 (1933); *Jorgensen* v. *York Ice Machinery Corp.*, 160 F.2d 432, 435 (2d Cir.) (Learned Hand, J.), cert. denied, 332 U.S. 764 (1947) ("[J]udges * * * would become Penelopes, forever engaged in unravelling the webs they wove.").

2. After 14 years of intensive study by members of the bar, judges, and legislators, this Court in 1972 promulgated uniform rules of evidence for the federal courts. In 1975, Congress enacted those rules into law as the Federal Rules of Evidence.[18] One of those rules, Fed. R. Evid. 606(b), in effect codified this Court's precedents regarding the inadmissibility of juror testimony to impeach the jury's verdict. This Court's proposed rule and the version ultimately enacted by Congress, which were identical, prohibited juror testimony for the purpose of impeaching the jury's verdict, with two limited exceptions—to determine "whether extraneous prejudicial information was improperly brought to the jury's attention" and to determine "whether any outside influence was improperly brought to bear upon any juror." Fed. R. Evid. 606(b). Hence, unless the proffered juror testimony concerns either "extraneous prejudicial information" or "outside influence," it is not admissible for the purpose of impeaching the jury's verdict.

Petitioners argue (Br. 33-34) that the use of alcohol by a juror falls within the rule's exception for juror testimony regarding "any outside influence [that] was improperly brought to bear upon any juror." The language and legislative history of the rule, however, rebut that contention and show that the "outside influence" exception does not encompass anything a juror does that might incidentally affect his mental processes during the trial or during the jury's deliberations.

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[18] See 51 F.R.D. 315 (1971) (advisory committee version); 56 F.R.D. 183 (1972) (Supreme Court version); Pub. L. No. 93-595, 88 Stat. 1926 *et seq.* (final version as enacted).

a. To extend the exception for "outside influence" to anything a juror voluntarily chooses to ingest would allow the exception to swallow the rule. Under petitioner's construction of the term, anything happening to any juror during the course of the trial (or even before the trial) that might affect the juror's mental processes would constitute an "outside influence." The rule's general prohibition against inquiring into "any matter or statement * * * or the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict" would be rendered nearly meaningless. As the district court aptly noted (J.A. 144):

> If you say that a juror who has something to drink outside the jury room and brings it with him is an outside influence, you might also say that any juror who stayed up half the night watching T.V. or had a big argument with his wife the morning before he came to trial so he was upset for the first half-day wasn't thinking straight, or any juror who had a particularly bad cup of coffee that morning was irritable all day.

No one, of course, can deny that such conditions might affect a juror's behavior in a given case.[19] It has nonetheless been recognized that such speculative

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[19] Indeed, such matters have been the subject of literary speculation:

> "I wonder what the foreman of the jury * * * has got for breakfast," said Mr. Snodgrass.
>
> "Ah!" said Perker, "I hope he's got a good one."
>
> Why so?" inquired Mr. Pickwick.
>
> "Highly important—very important, my dear Sir," replied Perker. "A good, contented, well-breakfasted jury-man, is a capital thing to get hold of. Discontented or hungry jurymen, my dear Sir, always find for the plaintiff."

C. Dickens, *The Pickwick Papers* 449 (N.Y. Heritage Press 1962).

inquiries into the mental processes of a juror must be disallowed if the institution of the jury is to be preserved. See *Model Code of Evidence* Rule 301, illus. 3 (1942) (juror's testimony that "he was induced to agree to the verdict because his wife was ill and he was anxious to get home" inadmissible); see also ABA Project on Minimum Standards of Criminal Justice, *Standards Relating To Trial By Jury* § 5.7 (a), at 171 (1968).

b. The legislative history of Rule 606(b) reveals that Congress considered the precise issue presented by this case—the admissibility of juror testimony regarding juror intoxication—and concluded that such testimony should not be allowed.

Rule 606(b) was the subject of considerable debate. The debate focused on whether the prohibition against juror testimony should extend to certain types of juror misconduct (such as allegations of juror intoxication) and not merely bar inquiry into the effect of certain conduct on the juror's thought processes. The version of Rule 606(b) that was proposed by the Advisory Committee was much shorter than the final version. It included neither the general prohibition against juror "testi[mony] as to any matter or statement occurring during the course of the jury's deliberations" nor the limited exceptions for "extraneous prejudicial information" or "outside influences" that are found in the version that was ultimately enacted. See 51 F.R.D. 387 (1971). Instead, the Advisory Committee proposal simply provided that a "juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or concerning his mental processes" (*ibid.*).

The Advisory Committee's version was the subject of much criticism. In a letter to the Advisory Committee, Senator McClellan criticized the proposed rule because it "would * * * permit the impeachment of verdicts by inquiry into, not the mental processes themselves, but what happened in terms of conduct in the jury room" (117 Cong. Rec. 33642, 33645 (1971)).[20] The Department of Justice voiced similar concerns in its own letter to the Advisory Committee: "The [rule] is a manifest departure from existing law concerning the extent to which jurors may impeach their verdict. * * * Strong policy considerations continue to support the rule that jurors should not be permitted to testify about what occurred during the course of their deliberations" (117 Cong. Rec. 33655 (1971)).

In response to those criticisms, the Advisory Committee drafted a new version, which the Supreme Court in turn formally adopted and transmitted to Congress. The new version embodied the language of the current rule, including the broad prohibition and the two discrete exceptions. See 56 F.R.D. 183 (1972); see also *Rules of Evidence, Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 316 (1973) (letter from Advisory Committee to Senator McClellan).

The issue whether juror testimony concerning allegations of juror intoxication would be allowed under the more stringent, traditional rule promulgated by

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[20] See 117 Cong. Rec. 33645 (1971) (letter from Sen McClellan to Advisory Committee) ("The mischief in this Rule ought to be plain for all to see. * * * I do not believe it would be possible to conduct trials, particularly criminal prosecutions, as we know them today, if every verdict were followed by a post-trial hearing into the conduct of the juror's deliberations. * * * I urge that you recognize that trials are human processes and that perfect trials, using lay jurors as the Sixth Amendment rightly commands, are an illusionary goal.").

this Court first explicitly arose during the House Judiciary Committee's consideration of the rule. The House Committee concluded that such testimony would have been allowed under the Advisory Committee's original proposal, but would not be allowed under this Court's version. For that reason, the House Committee amended the rule for the specific purpose of permitting such inquiries. The House Committee report noted that under the Court's version of the rule, a juror could testify "as to the influence of extraneous prejudicial information brought to the jury's attention," such as a radio broadcast or a newspaper article, and a juror could testify about an outside influence, such as a threat to the juror's family, but the Court's rule would not permit a juror to testify "to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations." H.R. Rep. 93-650, 93d Cong., 1st Sess. 9-10 (1973).[21] The House subsequently passed Rule 606(b), as revised by the Judiciary Committee.[22]

The House Committee's discussion of Rule 606(b) made two points clear. First, the Committee wanted the rule to permit juror testimony on allegations of

[21] See *Rules of Evidence (Supplement), Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 389 (1973) [hereinafter cited as *Supplemental House Hearings*] (letter from Prof. R. Carlson to House Committee concluding that misconduct such as "where a jury member consumed half a pint of whiskey during deliberations" would be "insulated from attack" under the version of Rule 606(b) proposed by the Court).

[22] Following the House Report, both Senator McClellan and the Department of Justice reiterated their earlier criticisms of the original Advisory Committee proposal. See *Supplemental House Hearings*, at 53-54 (Senator McClellan), 347 (Department of Justice).

juror intoxication, and second, the Committee did not believe the exception for "outside influence" in the Court's version of the rule permitted such testimony.

The Senate Committee rejected the House version of Rule 606(b) in favor of the more restrictive version promulgated by this Court. See S. Rep. 93-1277, 93d Cong., 2d Sess. 13-14 (1974). The Senate Committee did so with full awareness that the Court's version would have the effects that the House Committee had sought to avoid.[23] The Senate Committee report reflected a preference for the "long-accepted Federal law" in order to avoid "the harassment of former jurors by losing parties, as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors" (*ibid.*). The Conference Committee adopted the Senate version of the rule, which was then enacted into law. H.R. Conf. Rep. 93-1597, 93d Cong., 2d Sess. 8 (1974).

The legislative history thus reveals that Congress asked itself the very question posed by petitioners in this case. After considering and debating the issue, Congress selected "the lesser of two evils" (*McDonald* v. *Pless*, 238 U.S. at 267) by determining that juror

[23] The Senate report noted that the House version of the rule was "considerably broader" than the version proposed by this Court and that the House version "would permit the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of the conduct in the jury room. This extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised. * * * Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary * * *. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors." S. Rep. 93-1277, *supra*, at 13-14.

testimony on matters such as allegations of intoxication must be excluded.

c. Finally, the decisions of this Court and related statutory provisions support the conclusion that petitioners' allegations of juror intoxication do not fall within the "outside influence" exception in Rule 606(b). This Court's decisions suggest that "outside influence" is confined to improper efforts of outsiders calculated to influence juror impartiality. None of the decisions of this Court upholding the admissibility of juror testimony for impeachment purposes has involved juror misconduct even remotely similar to that alleged in this case. Instead, each of those cases involved instances in which third parties attempted to influence juror behavior by making remarks to jurors or by bribery or threats. See *Parker* v. *Gladden, supra*; *Remmer* v. *United States, supra*; *Mattox* v. *United States, supra.*

This interpretation of the term "outside influence" is consistent with its origin. Apparently first coined by Justice Holmes in *Patterson* v. *Colorado*, 205 U.S. 454 (1907), the expression was used in discussing the need to protect the jury from attempts by outsiders to influence the jury's deliberations. See 205 U.S. at 462 ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."); see also *Parker* v. *Gladden*, 385 U.S. at 364; *Sheppard* v. *Maxwell*, 384 U.S. 333, 351 (1966).

Related federal statutory provisions reflect a similarly narrow construction of the term. Provisions in the federal criminal code concerned with efforts by third persons to "influence" jurors in the discharge of their duties could not fairly be read as extending to the case of a juror "influenc[ing]" himself by

drinking alcohol or ingesting other substances. Instead, in those provisions, as in Rule 606(b), the exclusive congressional concern is with improper efforts by outside parties to influence the jurors. See 18 U.S.C. 1503, 1504; see also 18 U.S.C. 245(b)(1)(D).[24]

In sum, faced with the difficult choice between protecting the jury process from post-verdict challenge and permitting broad inquiry into allegations of juror misconduct, Congress has chosen the former, more traditional course. Congress has determined that the greater danger to the administration of justice and to the institution of the jury lies in broadening the grounds for jury impeachment, rather than

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[24] Petitioners cite Judge Weinstein's treatise in support of their view that juror intoxication is an "outside influence" within the meaning of the rule (Br. 34, citing 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 606[04], at 606-29 through 606-32 (1985)). Judge Weinstein's treatise, however, does not provide clear support for petitioners' position. At one point, the treatise notes that "[o]utside influence would seem to preclude proof of threats by one juror against the other or chance or quotient verdicts as well as *drunkenness of jurors not observed by outsiders*" (3 *Weinstein's Evidence, supra,* ¶ 606[01] at 606-15 (emphasis added)). In the section on which petitioners rely, the treatise makes the contrary assertion, but it cites as support only two lower court cases decided long before Rule 606(b), neither of which held that juror intoxication constitutes an "outside influence." See *id.* ¶ 606[04] at 606-29 through 606-30 n.25. The decision in *United States* v. *Provenzano*, 620 F.2d 985 (3d Cir.), cert. denied, 449 U.S. 899 (1980), which is also cited in the treatise, provides no support for petitioners' view at all. In that case, several jurors were accused of smoking marijuana. A marshal advised the judge of the problem during the trial, and the judge then spoke to the jurors in chambers. That case sheds no light on petitioners' claim that a party is entitled to interrogate a juror about juror intoxication after the jury has reached its verdict.

in adhering to the traditional rule. That judgment is consistent with this Court's observation in *McDonald* v. *Pless*, 238 U.S. at 268, that "while it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious arts and tampering with jurors.' The practice would be replete with dangerous consequences. 'It would lead to the grossest fraud and abuse' and 'no verdict would be safe.' "

The allegations of jury misconduct in this case, although dramatic, do not call for abandoning the judgment expressed in this Court's cases and in Rule 606(b). Consistent with the traditional approach to the issue of verdict impeachment, the rule and this Court's decisions reflect a judgment that the cost of permitting jurors to testify in support of post-trial challenges to verdicts is very high. For that reason, juror testimony on such subjects should be foreclosed, even if, in a particular case, such an inquiry might seem factually justified. The risk of manipulation and juror harassment is too great, and the cases in which relief would be justified are too few, to justify an exception to the general rule permitting juror interrogation in every case in which a colorable claim of misconduct is raised.

B. Apart From Rule 606(b), The District Court Did Not Abuse Its Discretion By Refusing To Permit Interrogation Of The Jurors

Even if Rule 606(b) did not preclude juror testimony in this case, the district court did not abuse its discretion by denying petitioners' motions for an evidentiary hearing to interrogate the jurors. The district court did not rely solely on Rule 606(b) to support its denial of petitioners' motions. The court also relied on its own evaluation of the substance of petitioners' preliminary showings of juror misconduct in determining that the extraordinary remedy of juror interrogation was inappropriate. In our view, the court's independent evaluation of petitioners' allegations, coupled with the compelling interests counseling against such interviews, justified the court's rulings.

1. In support of their first motion to interrogate jurors, petitioners filed an affidavit of Tanner's trial counsel (J.A. 246-248) that described a telephone conversation counsel had with one of the jurors concerning juror misconduct. In addition, petitioners filed two newspaper articles describing interviews with the same juror (*id.* at 139) and an affidavit of a private investigator hired by Tanner, who purportedly overheard a conversation between two jurors during the trial that suggested misconduct (*id.* at 177-180). At the hearing on the first motion, Tanner's counsel formally testified in support of the motion (*id.* at 169-171).

The allegations of juror misconduct accompanying the first motion were not compelling. The only possibly relevant allegation made in the affidavit filed by Tanner's counsel was that several of the male jurors drank alcohol at lunch during the trial and, as a result, "slept through the afternoons" (J.A. 247).[25] The private investigator's affidavit stated

[25] The other allegations purportedly made by the juror were that (1) " 'she did not believe the Defendants are guilty' "; (2) "she should have 'stood her ground' during the deliberations"; (3) one of the male jurors "intimidated her and some of the other jurors during deliberations, causing [the juror] to agree that the Defendants were guilty when she did not believe that they were"; and (4) some of the male jurors "didn't care about the trial or the Defendants." J.A. 247. Each of these allegations concerns inadmissible matters that "inhere in the [jury's] verdict" even under the most relaxed construction of Rule 606(b). See generally 3 *Weinstein's*

only that he had overheard one of the jurors asking two others where they were "going to drink [their] lunch" (*id.* at 179). Tanner's trial counsel stated at the hearing only that he saw several jurors sleeping and once noticed one of the jurors in a "giggly mood" (*id.* at 168, 171); he conceded that he had failed to call those matters to the court's attention at the time.

Even apart from Rule 606(b), these allegations fall short of requiring a hearing with testimony from the jurors. First, evidence that jurors consumed some alcohol during the trial does not provide a sufficient basis for overturning a jury verdict. See *United States* v. *Provenzano*, 620 F.2d at 997. Apart from the conclusory and speculative statement by Tanner's trial counsel that one juror "might well have been intoxicated," there is not even a bare allegation that the jurors drank an excessive amount of alcohol or that any one of the jurors was intoxicated. Indeed, one of the newspaper articles submitted by petitioners in support of their motion quoted the juror upon whom petitioners relied as denying that any juror had been intoxicated (J.A. 139).[26]

Moreover, the allegations that jurors had been sleeping were susceptible to independent evaluation by the trial judge without any juror testimony. For that reason as well, the court's denial of petitioners'

Evidence, supra, ¶ 606[04], at 606-28 to 606-29; ABA Project on Minimum Standards for Criminal Justice, *Standards Relating To Trial By Jury, supra*, at 172; Comment, *Impeachment of Jury Verdicts*, 25 U. Chi. L. Rev. 360, 362-364 (1958); see also *Hyde* v. *United States*, 225 U.S. at 384.

[26] The district court was also entitled to discount the testimony of Tanner's trial counsel because, as noted by the district court (J.A. 168), the court had previously advised counsel to bring any such matters to the court's attention during the trial, and counsel had not done so (*ibid.*; see *id.* at 147).

motion was not an abuse of discretion. In denying the motion, the trial judge pointed out that he ha[d] an unobstructed view of the * * * jury box" and that he "didn't see anybody sleeping" (*id.* at 147-149, 167-168). The trial judge also invited the parties to call to the witness stand any courtroom personnel or marshal who worked during the trial. The judge noted that in the past, courtroom employees with an opportunity to observe the jury had always reported to him any possible problems with the jury and that "[n]othing was brought to my attention in this case about anybody appearing to be intoxicated or being intoxicated' (*id.* at 171-172). Only after reiterating that he had "observed everything there was to observe" (*id.* at 173) and had seen "nothing to suggest" that any jurors were intoxicated (*id.* at 171-172), did the judge conclude that the motion to interview the jurors should be denied (*id.* at 173). In light of the judge's ability to evaluate petitioners' allegations based on his own observations, the denial of that motion was not an abuse of the district court's discretion.

2. Nor did the district court abuse its discretion in denying petitioners' second motion to interview the jurors. While the affidavit by Juror Hardy, which was filed in support of the second motion, contained more particular allegations of alcohol and drug use by the jurors, Juror Hardy conceded that none of the jurors with whom he drank at lunch had been drunk (Pet. App. 47). The only allegations in his affidavit concerning the effects of the drug and alcohol ingestion were his claim that his "reasoning ability" had been impaired on one day of the trial and that several of the other jurors were "falling asleep all the time during the trial" (*id.* at 46, 55). These conclusions, like those accompanying petitioners' first motion, were confined to jury conduct dur-

ing the trial and did not refer to the jury's deliberations.[27] Like the allegations in the first motion, they were subject to evaluation by the trial judge based on his first-hand observations of the jurors (and the absence of any contrary reports by courtroom personnel).[28]

The district court was entitled to disregard the allegations in support of petitioners' second new trial motion for a second reason as well: the Hardy affidavit that provided the basis for the second motion was obtained in direct violation of the court's prior order and of a local court rule. Upon denying petitioners' first motion to interrogate the jurors, the court specifically instructed petitioners, in accordance with the court's local rule (M.D. Fla. R. 2.04 (c)), not to interview any of the jurors without receiving the court's prior approval (J.A. 181-182). Petitioners violated that order and the local rule by obtaining the Hardy affidavit without first seeking or obtaining approval from the court.

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[27] The allegations in the affidavits filed by Tanner's counsel and Juror Hardy pertained exclusively to juror conduct during the trial. See J.A. 246-248; Pet. App. 23-56; see also J.A. 159. The only reference to jury deliberations is contained in an ambiguous affidavit filed by one of Tanner's employees, in which the employee claimed that Juror Hardy had stated that three male jurors had each had a pitcher of beer "within three hours of rendering a verdict in the case." See J.A. 244-245. Juror Hardy's affidavit does not confirm that account.

[28] That the drugs allegedly used by some jurors were illegal should not affect the analysis. See *United States* v. *Provenzano*, 620 F.2d at 997 ("[P]ublic knowledge that sitting jurors were smoking marijuana does not create such an appearance of impropriety as to warrant reversal of convictions where the jurors were not dismissed."). Presumably, petitioners' argument would be the same if the jurors had consumed prescription drugs that allegedly affected the jurors' attentiveness and ability to reason.

As described in the affidavits accompanying the second motion, Juror Hardy arrived unannounced at the home of Tanner's counsel, who invited him in. Tanner's counsel did not seek permission from the court to interview the juror either at that time or when he telephoned Juror Hardy two days later to ask him if he would agree to a transcribed interview. See Pet. App. 25-27; J.A. 241-242.

Because the interview with Juror Hardy was conducted in violation of the court's order and the local court rule, the district court was entitled to ignore the affidavit that resulted from that interview. Federal district courts throughout the country rely on local rules similar to the local rule upon which the district court relied in this case.[29] Courts and commentators, moreover, have uniformly recognized the importance of judicial control over access to jurors.[30]

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[29] See, *e.g.*, N.D. Ala. R. 10; S.D. Ala. R. 12; M.D. Ala. R. 9; D. Alaska R. 3(H); D. Ariz. R. 12; D. Ark. R. 25; D. Conn. R. 12(f); S.D. Fla. R. 16(e); S.D. Ga. R. IV(8); S.D. Ind. R. 35; D. Kan. R. 23A; E.D. Ken. R. 12(b); E.D. La. R. 14.5; M.D. La. R. 16(A)(5); W.D. La. R. 16; D. Md. R. 25A; S.D. & N.D. Miss. R. 1(b)(4); E.D. Mo. R. 16(D); D. N.J. R. 19B; M.D. N.C. R. 112(b); E.D. N.C. R. 6.03; S.D. Ohio R. 5.6; N.D. Okla. R. 8; W.D. Okla. R. 30(B)(5); E.D. Okla. R. 8; D. P.R. R. 322; D. R.I. R. 15(g); M.D. Tenn. R. 12(h); W.D. Tenn. R. 19; S.D. Tex. R. 2(f); W.D. Tex. R. 500-2; N.D. Tex. R. 8.2(e); E.D. Tex. R. 10; W.D. Wash. R. 47(b); N.D. W. Va. R. 1.19; S.D. W. Va. R. 3.02; E.D. Wis. R. 8.06; D. Wyo. R. 411.

[30] See *United States* v. *Davila*, 704 F.2d 749 (5th Cir. 1983); see also *United States* v. *Moten*, 582 F.2d 654, 665 (2d Cir. 1978) ("A serious danger exists that, in the absence of supervision by the court, some jurors, especially those who were unenthusiastic about the verdict or have grievances against fellow jurors would be led into imagining sinister happenings which simply did not occur * * *. Thus, supervision is desirable not only to protect jurors from harassment but also to insure that the inquiry does not range beyond

Before interviewing Juror Hardy, petitioners should have sought judicial approval; if their request had been denied, they could have protested that denial to the court of appeals as part of their new trial claim.[31] In light of petitioners' disregard of the court's order and the local rule, it was not an abuse of discretion for the district court to deny the second motion for a new trial.

C. The Sixth Amendment Does Not Require An Evidentiary Hearing To Question Jurors About Allegations Of Juror Intoxication

Petitioners claim (Br. 30, 33-34) that the Sixth Amendment provides them with a constitutional right to an evidentiary hearing at which they can interrogate jurors about possible juror misconduct. In effect, they ask this Court to declare Fed. R. Evid. 606(b) unconstitutional to the extent that it precludes such a hearing. The Sixth Amendment, however, does not entitle petitioners to an evidentiary hearing of that kind.

While a defendant has a right to a mentally competent jury, that does not answer the question whether the defendant is constitutionally entitled to use any possible source of evidence to prove that a particular juror was mentally incompetent or impaired during the trial. Cf. 8 J. Wigmore, *Evidence*,

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subjects on which a juror would be permitted to testify under rule 606(b)."); see also ABA Project on Minimum Standards for Criminal Justice, *Standards Relating To Trial By Jury*, *supra*, at 165.

[31] The aggrieved party in *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1983), after being denied permission to interview a juror, subsequently filed a second motion with additional information, which the district court granted with certain conditions. See *id.* at 550-551. The party did not, as Tanner's counsel did in this case, ignore the court's authority and interview the juror without judicial approval.

supra, ¶ 2253, at 697-698 ("The question, it is to be remembered, is not whether certain conduct constitutes a fatal irregularity or whether it can be proved at all, but whether a *juror alone* is to be forbidden to prove it.").

The Sixth Amendment does not require that a trial court allow the interrogation of jurors in response to every type of allegation of juror misconduct. Rather, the need for an evidentiary hearing turns on the nature of the allegation made in a particular case. When a colorable allegation is made that the juror was exposed to potentially prejudicial extrinsic influence, the Sixth Amendment normally requires that a trial court hold an evidentiary hearing to explore the matter. See *Smith* v. *Phillips*, 455 U.S. 209, 217-218 (1982); *id.* at 222 (O'Connor, J., concurring); *Remmer* v. *United States*, 347 U.S. 227, 230 (1954); see also *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983). The traditional presumption against post-verdict inquiry into jury deliberations is overcome in that circumstance by a presumption of prejudice to the defendant's right to an impartial jury. See *Remmer* v. *United States*, 347 U.S. at 229; *Sullivan* v *Fogg*, 613 F.2d 465, 467 (2d Cir. 1980); *United States* v. *Dioguardi*, 492 F.2d 70, 80 (2d Cir.), cert. denied, 419 U.S. 829 (1974). Claims of juror partiality due to extrinsic influence are usually susceptible to meaningful evaluation only through an evidentiary hearing. For those reasons, Rule 606(b) permits juror testimony to prove extrinsic influence in the form of "extrinsic prejudicial information" or "improper[] outside influence."

The Sixth Amendment, however, does not require the interrogation of jurors in a case such as this one, where the allegations of juror misconduct concern intrinsic influences bearing on juror attentive-

ness during the trial.[32] Because the inquiry into juror attentiveness involves considerations internal to the jury process, courts have required an especially strong showing of impairment prior to ordering any post-verdict inquiry. See, *e.g.*, *Government of Virgin Islands* v. *Nicholas*, 759 F.2d 1073, 1077-1081 (3d Cir. 1985); *United States* v. *Barshov*, 733 F.2d 842, 851 (11th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *Sullivan* v. *Fogg*, 613 F.2d at 467; *United States* v. *Dioguardi*, 492 F.2d at 80 ("[A]bsent • • • substantial if not wholly conclusive evidence of incompetency, courts have been unwilling to subject a juror to a hearing on his mental condition merely on the allegations and opinions of

[32] Petitioners' allegations of juror misconduct, while couched in terms of juror "competency," are more accurately characterized as claims of juror "inattentiveness" due to intoxication, a form of behavior particularly susceptible to judicial observation. Indeed, as described by petitioners in the district court, their Sixth Amendment claim in this case appears to be based on the proposition that the Constitution guarantees them the right to both an impartial and "attentive" jury. See, *e.g.*, J.A. 117 (Def. Motion for Interview of Jurors and Other Relief) ("It is simply impossible to secure a full and fair analysis of the evidence by an impartial and attentive jury."); *id.* at 127 (remarks of Conover's trial counsel at hearing on first motion) ("[I]t is more than sufficient to demonstrate that some jurors were drinking alcoholic beverages over the lunch hour during days when court was in session and that this had an effect on their ability to be attentive and to concentrate on the trial procedures."); see also *id.* at 152 (remarks of Tanner's counsel at hearing on first motion) (alcohol is an "outside source inasmuch as it precludes the effective hearing and attention to all the evidence in the trial"). Few jury trials would survive such a constitutional requirement of juror attentiveness. Cf. *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 555 (1984).

a losing party."). [33] Moreover, because a full-scale evidentiary hearing, including juror interrogation, is not indispensable to the court's evaluation of certain types of allegations of juror impairment, the Sixth Amendment does not mandate juror interrogation in those cases.

Unlike juror partiality, which tends to express itself only during jury deliberations and, hence, outside the presence of the trial judge, juror incompetence or inattentiveness is often reflected in juror behavior that is observable during the trial, either by the judge, by counsel, or by court personnel.[34] In addition, it is not unusual for other members of the jury to report to the court instances of a juror's incompetence, inattentiveness, or disruptive behavior before the trial ends. The trial judge can often evaluate the force of the allegations based on his own observations of the jury during the trial, and when the matter is reported during the trial, the judge can take steps to resolve it. See *United States* v. *Dioguardi*, 492 F.2d at 78, 81. Those measures, together with the jury screening process prior to trial, provide substantial protection against the risk that incompetent or seriously impaired jurors will be selected and remain on the jury.[35]

[33] The court in *Dioguardi* noted with approval the contrast between the courts' willingness to set aside jury verdicts "when there is proof of tampering or *external* influence" and the courts' reluctance to inquire into "possible *internal* abnormalities except 'in the gravest and most important cases.'" 492 F.2d at 79 n.12 (quoting *McDonald* v. *Pless*, 238 U.S. at 269).

[34] For example, in *United States* v. *Provenzano*, 620 F.2d at 996-997, the trial judge learned about possible juror misconduct (smoking marijuana) from the marshal during the trial.

[35] In addition, the requirement that the jury be unanimous in its verdict is designed in part to protect the parties in criminal cases against the risk that one or more jurors will

In this case, the court observed the jury throughout the trial and saw no reason to question any juror's competence or attentiveness. J.A. 148, 167-168, 173. One of the defense counsel claimed to have noticed jurors sleeping, but he failed to call the matter to the attention of the court at the time. Courtroom officers, including those charged with attending the jury during the lengthy trial proceedings, did not report any unusual conduct among the jurors. And, except for calling Tanner's counsel, petitioners declined the court's offer to call any nonjuror to testify in support of their allegations (J.A. 169-171). Under those circumstances, the district court did not violate petitioners' rights under the Sixth Amendment by refusing to permit the post-verdict interrogation of the jurors in this case.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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be inattentive at some points during the trial. The requirement of unanimity provides a margin of confidence in the accuracy of verdicts that makes even less compelling the need for close scrutiny of the jury's internal processes.

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In The

Supreme Court of the United States

October Term, 1986

ANTHONY R. TANNER and WILLIAM M. CONOVER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SECTION 371, WHICH CRIMINALIZES CONSPIRACIES "TO DEFRAUD THE UNITED STATES", DOES NOT "PLAINLY AND UNMISTAKABLY" EXTEND TO A CONSPIRACY TO DEFRAUD A PRIVATE CORPORATION WHICH IS NEITHER AN AGENCY NOR REPRESENTATIVE OF THE FEDERAL GOVERNMENT AND WHICH HAS NO RELATION TO THE FEDERAL GOVERNMENT EXCEPT THAT IT IS A RECIPIENT OF A FEDERALLY GUARANTEED LOAN.

A. The Government Errs When It Says That Section 371 "Unambiguously" Applies To A Conspiracy To Defraud A Private Corporation And That Prior Cases From This Court Support Extension Of Section 371 Liability To These Petitioners.

The government's position is based upon an erroneous premise: that Section 371 "unambiguously" (GB 26) extends to a conspiracy to defraud a *private corporation* which has *no* connection to the federal government except that it is a recipient of a federally guaranteed loan. The face of Section 371 prohibits conspiracies to "defraud the *United States* or any *agency* thereof." Seminole is obviously neither "the United States" nor an "agency thereof,"[1] and the government does not contend otherwise.[2] Thus, the language of Section 371 simply does not reach a conspiracy to defraud a private corporation. *See Perrin v. United States*, 444 U.S.37, 42 (1979) (in determining reach of criminal statute, this Court first looks to the language of the statute itself).

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[1] *See* PB 18-19, n.8. ("PB —" refers to petitioners' main brief. "GB —" refers to the government's brief).

[2] The government does argue that Seminole was "an intermediary" of the federal government (*e.g.*, GB 21), but the term "intermediary" appears nowhere in the language of Section 371. Moreover, as demonstrated *infra* pp. 5-9, the government's designation of Seminole as an "intermediary" is a mischaracterization of Seminole's relationship with the federal government.

The government also completely ignores the legislative history (or lack thereof) of Section 371, perhaps because the legislative history *gives absolutely no indication* that Congress envisioned that Section 371 would apply to a conspiracy to defraud a private entity (PB 18-20). However, this Court *should* look to congressional intent concerning Section 371, as it routinely does to determine the scope of a federal criminal statute. *E.g., Dowling v. United States,* 105 S.Ct.3127, 3134 (1985). Where, as here, the legislative history is "limited," this Court considers "what Congress did not say." *Rewis v. United States,* 401 U.S. 808, 811-12 (1971). The scant legislative history of Section 371 gives no hint that Congress intended that conspiracy "to defraud the United States or any agency thereof" would also mean "conspiracy to defraud a private corporation which receives a federally guaranteed loan." At minimum, the uncertainty of the applicability of Section 371 to the conspiracy charged here is sufficient to invoke the rule of lenity "consistent with [this Court's] usual approach to the construction of criminal statutes." *Williams v. United States,* 458 U.S.279, 290 (1982) (*see* PB 25-28).[3]

Neither does the government find any comfort from this Court's prior decisions construing Section 371. In particular, the government cites *Nye & Nissen v. United States,* 336 U.S.613 (1949) to support the proposition that Section 371 encompasses fraud "when the immediate object of the fraud is an intermediary which . . . is in effect

[3] Similar issues concerning whether breaches of a private corporation's work rules can constitute a federal crime under the federal mail and wire fraud statutes are presented in another case accepted by this Court. *United States v. Carpenter,* 791 F.2d 1024 (2d Cir.1986), *cert. granted,* 107 S.Ct. 666 (No. 86-422, 1986 Term). *See* Brief for Petitioners at 28-38, *Carpenter v. United States,* No. 86-422.

acting on behalf of the federal government" (GB 21). However, *Nye & Nissen* does not contain this or any similar language and does not even involve a construction of Section 371, but rather whether the petitioners, who were part of a conspiracy to directly defraud the Army, Navy and War Shipping Administration (a federal agency), could also be convicted of the substantive crime of filing false claims. *Id.* at 616, 618.

The government also relies upon decisions of this Court construing unrelated statutes (GB 22). Only one, *Dixson v. United States,* 465 U.S.482 (1984), merits discussion, not only because it is extensively cited by the government (GB 22, 23 n.13, 24, 25, 26, 27), but also because, by contrast, it makes petitioners' point. In *Dixson,* the Court considered whether officers of a private corporation administering federal community development funds were "public officials" under the federal bribery statute. *Id.* at 484. The Court first determined that "the language of [the statute] does not decide the dispute." *Id.* at 491:

> "We must turn, therefore, to the legislative history of the federal bribery statute to determine whether these materials clarify which of the proposed readings is consistent with Congress' intent. *If the legislative history fails to clarify the statutory language, our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases.*" *Id.* (emphasis supplied) [citing *Rewis v. United States,* 401 U.S.808, 812 (1971)].

This Court in *Dixson* reviewed the extensive legislative history of the federal bribery statute, *id.* at 491-98, and concluded that Congress, by "explicitly" endorsing prior judicial decisions concerning the scope of the statute, had "intended [the statute] to cover local officials like petitioners." *Id.* at 496, 497. However, the Court, in limiting its holding, stated that "*the mere presence of some*

federal assistance" would *not* be enough to make a local employee a "public official" under the statute. *Id.* at 499 (emphasis added).[4] Notably, four members of the Court dissented in *Dixson*, finding both the language and legislative intent of the statute ambiguous and concluding that the rule of lenity required an interpretation of the statute favorable to the petitioners. *Id.* at 501 (O'Connor J., dissenting).

Here, like the federal bribery statute in *Dixson*, the language of Section 371 does not on its face prohibit petitioners' conduct. However, unlike *Dixson*, there is *no* legislative history of Section 371 which would permit this Court to find that Congress intended that the words "conspiracy to defraud the United States or an agency thereof" should be extended to a conspiracy to defraud a private corporation receiving a federal loan. "Congress has demonstrated well its ability to utilize the criminal law to protect its far-flung financial and other interest in non-federal programs or entities. Because it has not done so here, Section 371 should not be construed to reach [petitioners'] acts" (Pet.App.21-22) (Hill, J., specially concurring) (footnote omitted).[5]

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[4] This is consistent with Judge Hills' statement below that Section 371 should not be held to reach conspiracies to defraud private entities receiving a federal loan which entails only a "modicum of federal supervision" (Pet. App.20) (Hill, J., specially concurring).

[5] The government cites "numerous court of appeals decisions" which it says uphold Section 371 prosecutions "when the immediate object of the fraud has been a non-federal public or private intermediary responsible for administering a federally sponsored program" (GB 22; *see also id.* at 23, 27). However, every court of appeals decision cited by the government (save one, *United States v. Hay*, 527 F.2d 990 (10th Cir.1975), *cert. denied*, 425 U.S. 935 (1976), which is otherwise distinguishable) involves fraud upon a *governmental agency, state or local, administering a federal government program.* In these circumstances, the defrauded governmental agency *is* acting as an

(Continued on following page)

B. The Government's Contention That A Section 371 Prosecution Can Lie For A Conspiracy To Defraud A Private Entity If There Is "Substantial Ongoing Federal Supervision" Of The Private Entity Or "Delegation [By The Government] Of A Distinctly Federal Function" To The Private Entity Is Unsupported By The Statute Or Its Rationale. Moreover, There Was No Such Evidence In This Case.

The government rightly concedes that Seminole was neither "the United States" nor "an agency thereof" and that the alleged conspiracy was directed toward Seminole (*e.g.*, GB 11). However, seeking to find some basis to bring a conspiracy to defraud Seminole within Section 371, the government argues variously that Seminole was a federal government "intermediary" (GB 23), that Seminole was "in effect acting on behalf of the federal government" (GB 21) and that the Seminole construction project was "an essentially federal program" (GB 27). None of these characterizations, even if true (which they are not), would support a Section 371 prosecution because they find no support in the wording or meaning of the statute. Similarly, the government's reliance upon *Haas v. Henkel*, 216 U.S.462, 479 (1910) in which the Court, on very different facts (*see* PB 23), stated that Section 371 includes "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Gov-

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"agency" of the federal government in administering the federal program. Here, however, the alleged conspiracy to defraud was against a *private corporation which was not administering a federal program* but was merely the recipient of a federally guaranteed loan *to be used in a non-federal construction project.* The government's leap from the imposition of Section 371 liability on a conspiracy to defraud a governmental agency administering a federal program to imposition of liability on a conspiracy to defraud a private corporation with tangential federal government connections is unwarranted. *See also United States v. Porter*, 591 F.2d 1048, 1055-58 (5th Cir.1979) (reversing Section 371 conviction on reasoning applicable here).

ernment," begs the question because the offense charged here was a conspiracy to defraud Seminole, which is not a "department [or agency] of Government."[6]

The government further concedes that not every conspiracy to defraud a private entity with some connection to the federal government is actionable under Section 371: "Section 371 *does not apply* to fraudulent conduct against any entity that receives *some amount* of federal financial assistance or is subject to *some form* of federal regulation" (GB 25) (emphasis supplied). Having conceded this, the government arbitrarily decides (without benefit of authority) that a conspiracy to defraud a private entity *can* become a conspiracy to defraud the United States within the meaning of Section 371 if there is "substantial ongoing federal supervision" of the private entity or "delegation [by the government] of a distinctly federal function" to the private entity (GB 25-26). The government's formulation is made up out of whole cloth, finds no support in the statute, the legislative history or prior decisions of this Court and should be rejected. *See supra* pp. 1-5.

Even accepting the government's criteria, there simply was no evidence of "substantial ongoing federal supervision" by REA of Seminole, nor did REA delegate "a distinctly federal function" to Seminole. Seminole is a

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[6] The government also sets up a strawman when it argues that it is not necessary under Section 371 to demonstrate either pecuniary loss to the government or to show a direct violation of a federal statute or regulation (GB 17-18). Petitioners have conceded this from the outset (PB 20, 28). Rather, petitioners contend that to convict under Section 371, the government must prove a conspiracy to defraud the *"United States or any agency thereof"* by (1) causing the government pecuniary loss; (2) violating a federal statute or regulation or (3) obstructing or interfering with the lawful function of a government agency (PB 28). *See Dennis v. United States*, 384 U.S. 855 (1966). Proof of a conspiracy to defraud a private entity with tangential government connections satisfies none of these criteria and is insufficient to prove a crime under Section 371.

private corporation owned by eleven rural cooperatives and was engaged in a non-federal construction project. The *only* federal government connection with the Seminole project was that Seminole borrowed construction funds which were guaranteed by REA. REA *did not* exercise any regulatory jurisdiction over Seminole (PB 17-18, n.6) and the contracts which were the subject of the alleged conspiracy did not require prior REA approval (PB 7-8).[7]

Similarly, the loan documents between REA and Seminole upon which the government heavily relies (GB 15-16)[8] merely gave REA the traditional rights of a lender/guarantor to protect its collateral. The loan documents *do* establish the relationship of REA, as guarantor, and Seminole, as borrower, but have nothing to do with the contracts between Seminole and Tanner's companies which were the subject of the alleged conspiracy. Certainly, there is nothing in the loan documents which constitutes the delegation by REA of a "distinctly federal function" to Seminole.

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[7] The government's argument that "at least one of the two contracts" awarded Tanner's companies required prior REA approval fails. The testimony cited by the government (GB 16) established at most that prior REA approval was required for a "transmission construction" contract and not for the fill dirt contract at issue here (J.A.44-45). And, when the defense attempted to introduce exhibits through the *same witness* to show that REA officials themselves questioned whether prior REA approval of Tanner's fill dirt contract was required, the trial court sustained the government's objection, finding the exhibits irrelevant (J.A.46-50). Additionally, as previously discussed in petitioner's main brief (PB 7-8, n.3), the trial judge excluded from evidence a subsequent letter from REA to Seminole which *conclusively* showed that prior REA approval of both of the contracts awarded to the Tanner companies *was not required* (J.A. 52).

[8] Significantly, the REA bulletin (J.A.77) upon which the government places much emphasis, was *excluded from evidence by the trial judge* who found it "not relevant to any issue in this case . . ." (J.A.50-51).

Finally, the government's attempt to show that REA engaged in "substantial ongoing federal supervision" of the Seminole project, collapses for lack of evidentiary support. The government bravely argues that REA's involvement in the contracts between Seminole and Tanner's companies was more than "theoretical" (GB 16), but supports this only with the weak assertion that "Seminole employees consulted an REA official on several occasions about the bidding procedures on [the Tanner] contracts." *Id.*[9] This is the *full extent* of the "substantial ongoing federal supervision" by REA which the government claims is necessary to convert the conspiracy to defraud Seminole into a conspiracy to defraud the United States. Thus, there was no evidence that REA "substantially" supervised Seminole vis-a-vis Seminole's contracts with Tanner's companies or that Seminole was carrying out a "distinctly federal function" concerning these contracts.

Moreover, the government suggests no basis upon which this Court, or lower courts, can determine when the federal supervision is "substantial" enough or when the function delegated is "distinctly federal" enough to render a conspiracy to defraud a private entity a conspiracy to defraud the United States under Section 371. Thus, in a futile attempt to sustain a Section 371 conviction in this case, the government would have this Court adopt a nebulous and unworkable definition of "conspiracy to defraud the United States," and then stretch the evidence beyond the breaking point to fit this new definition. The Court should reject this invitation, find the language of Section 371 itself controlling and reverse petitioners' convictions.

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[9] The "consultation" between REA and Seminole concerning these contracts consisted only of "recommendations" by an REA official about bidding procedures (J.A.24-28; 31-32).

C. If The Court Reverses Petitioners' Section 371 Convictions, It Should Also Reverse The Mail Fraud Convictions.

The government cannot have it both ways. In its brief concerning Section 371, the government argues mightily (and, we respectfully suggest, wrongly) that the conspiracy to defraud was not merely against a private entity but was, in fact, against the United States. When it seeks, however, to sustain the petitioners' mail fraud convictions, the government argues that the fraud committed against Seminole was a "private fraud" (GB 28, n.17).

Notwithstanding this, the mail fraud charges brought by the indictment (J.A.12-15) depended upon proof of a conspiracy to defraud the United States. Thus, if the Court reverses the Section 371 convictions, it should also reverse the mail fraud convictions as was done in the identical situation in *United States v. Porter*, 591 F.2d 1048, 1058 (5th Cir.1979).[10]

II

PETITIONERS ARE ENTITLED TO A HEARING TO DETERMINE WHETHER JURORS WERE RENDERED INCOMPETENT TO CONSIDER AND DECIDE THE CASE BY THEIR EXCESSIVE USE OF ALCOHOL AND DRUGS DURING THE PROCEEDINGS.

Implicit in the issue raised by the petition—whether sworn evidence that jurors were consuming large quantities of drugs and alcohol throughout the proceeding requires an evidentiary hearing in order to determine if defendants were afforded a fair trial—is the assumption

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[10] The government's reliance upon the jury instructions to differentiate between the Section 371 conspiracy to defraud the United States and the so-called "private fraud" against Seminole is misplaced because this Court has long held that the indictment governs the crime charged and a defendant may not be convicted of a crime which is not charged by the indictment. See *Stirone v. United States*, 361 U.S. 212 (1960).

(consistent with this Court's prior decisions) that under the sixth amendment, defendants are entitled to a trial before a jury "capable" of deciding the case on the evidence. *Smith v. Phillips*, 455 U.S. 209, 217 (1982). In an attempt to deflect consideration of the issue raised, the government urges that because jurors are "ordinary citizens" (GB 28) their "privacy" should be protected; that this Court should rigidly enforce rules prohibiting "post-verdict interrogation of jurors" (GB 28-29) so as to protect jurors from juror "harassment and tampering" (*id.*); and therefore it should refuse to permit any inquiry which will determine whether jurors were rendered incapable of considering the evidence and rendering a verdict. While petitioners likewise revere the sanctity of the jury process and do not suggest wholesale intrusion into its deliberations, the egregious facts presented in this record clearly demonstrate that there are instances to which the shield of juror confidentiality must yield. As aptly noted by Justice Cardoza:

> "[A juror of integrity] will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. . . . [The privilege of confidentiality] must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption." *Clark v. United States*, 289 U.S. 1, 16 (1933).

The government attempts to couch the question as one of "juror attentiveness during the trial," rather than juror "competency" (GB 47-48), and when referring to Dickens' *Pickwick Papers* (GB 33 n.19), facetiously suggests that if what one had for breakfast, or whether the juror argued with a spouse was deemed an "outside influence" so as to constitute an exception to the Rule, the exception would "swallow the rule" (GB 33).

While as stated, the argument is persuasive, it misses the mark. Petitioners are not contending that anything which "might affect the juror's mental processes" during the trial (GB 33)—whether lack of sleep, an argument with a spouse, a bad cup of coffee, or even consumption of alcohol—would constitute an "outside influence" so as to permit interrogation of a juror concerning the actions of another. Rather, petitioners contend that sworn evidence demonstrating that one juror has observed other jurors consuming alcohol and drugs in such quantities as to render them incapable of comprehending the evidence and deliberating a verdict requires an evidentiary hearing to determine competency.[11] Thus, it is "competency," not "inattentiveness," which is at issue. The sworn evidence here, if shown to be true at an evidentiary hearing, would render the jurors involved physically or mentally incapable of comprehending the evidence and arriving at an impartial verdict. Petitioners thus are not attempting to disqualify a "discontented or hungry" juror (GB 33 n.19), but one rendered physically or mentally incapable of affording a fair trial by the use of alcohol and drugs.[12]

Contrary to the government's position (GB 30), the common law rule emanating from Lord Mansfield's opinion in *Vaise v. Delaval*, 1 T.R.11, 99 Eng.Rep.944 (K.B.

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[11] Such persons would, of course, be initially disqualified from jury service under 28 U.S.C. § 1865(b)(4) (1982), which excludes from jury service any person "incapable, by reason of mental or physical infirmity, to render satisfactory jury service . . . ."

[12] Clearly, a juror taken suddenly and seriously ill during deliberations, or one who became insane or mentally afflicted would be disqualified from participating in the verdict. 3 D. Louisell and C.Mueller, Federal Evidence § 289 at 145 (1979).

1785), does not prohibit inquiry of the type here sought.[13] Neither does Rule 606(b), Federal Rules of Evidence, by its terms or its legislative history, prohibit inquiry to determine whether jurors were, by the use of alcohol and illegal drugs, rendered incompetent to hear and determine the case. To prohibit such an inquiry upon the facts here presented would be to vitiate the sixth amendment's guarantee of right to trial by a fair and impartial jury.

A. Rule 606(b) Does Not Exclude Evidence Of Juror Intoxication During The Course Of The Trial.

The legislative debate over adoption of Rule 606(b) centered not (as one might believe from reading the government's brief), on whether a juror might give testimony concerning another juror's intoxication during the proceedings, but rather, upon the ability of one juror to give testimony on the proceedings within the deliberations themselves, and, most importantly, the matter of quotient verdicts. *See generally* 3 J.Weinstein and M.Berger, Weinstein's Evidence §§ 606[01]-606[09] (1985); 3 D. Louisell and C.Mueller, Federal Evidence §§ 284-292 (1979).

The Advisory Committee on Rules of Evidence began with a narrow exclusionary definition which would have permitted liberal impeachment of verdicts by affidavits or testimony of jurors. Preliminary Draft of Proposed Rules of Evidence (March 1969), Rule 6-06(b), 46 F.R.D. 161, 289-290 (1969). As originally proposed, the Rule would have prevented jurors from testifying only as to the "effect of anything" on the "mind or emotions" of

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[13] As Wigmore notes [two sections following that cited by the government (GB 30)], certain kinds of misconduct constitute such an irregularity as to set aside the verdict; included "plainly are acts of intoxication . . . consultation of witness or party, acceptance of bribes . . . ." 8 J. Wigmore, Evidence § 2354 at 703 (McNaughton rev.ed. 1961).

a juror and the "mental processes" of jurors. It contained no exceptions. Thus, this Preliminary Draft would have allowed inquiry into whether the jury's determination was the result of a quotient verdict.

Apparently as the result of input from Senator McClellan and the Justice Department, the Advisory Committee introduced substantial changes into the Preliminary Draft of the Rule, which expanded the exclusionary definition to reach not only the "effect of anything" and the "mental processes" of jurors, but also "any manner or statement occurring during the course of the jury's deliberations."[14] However, the changed version, as ultimately proposed to and adopted by this Court and Congress, also introduced, for the first time, two crucial exceptions: Testimony or affidavits by jurors could be received on the question of (i) "whether extraneous prejudicial information was improperly brought to the jury's attention," or (ii) "whether any outside influence was improperly brought to bear upon any juror."[15] The latter exception does not appear in the Justice Department's recommendation.[16]

The House Subcommittee to which the new Rules were referred and ultimately the House Judiciary Committee sought a return to the original Preliminary Draft version of Rule 606(b). The assertion contained in the letter of Professor Carlson to the House Subcommittee to the effect

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[14] All of this is consistent with the memorandum submitted by Attorney General Kleindienst. *See* Letter from Deputy Attorney General Richard D. Kleindienst to Judge Maris (Aug. 9, 1971), *reprinted in* 117 Cong.Rec.33,648, 33,654-55 (1971).

[15] H.R. 5463, 93d Cong., 1st Sess., 119 Cong.Rec.21,405, 21,410 (1973).

[16] S.2432, 92d Cong., 1st Sess., 117 Cong.Rec.33,641, 33,655 (1971).

that the revised Rule would not allow inquiry into juror intoxication (cited in the government's brief at GB 36 n.21), is offered in support of his position to reinstate the original form of the Rule. The overall import of his letter centered not on this issue but on the question of whether quotient verdicts should be permitted.[17] Indeed, in a follow-up letter to Congressman Hungate after the House Committee reapproved the earlier version, the professor dropped any reference to the question of intoxication and mentioned only the matter of "quotient verdicts."[18] Similarly, debate on the House floor surrounding the adoption of Rule 606(b) centered on the quotient verdict issue.[19] To state, as the government does in its brief, that the single comment on this question (authored by Professor Carlson and carried forward by the House Report[20]) makes "clear" that the "Committee did not believe the exception for 'outside influence' in the Court's version of the rule permitted [testimony on the juror intoxication]" (GB 36-37), is to overstate the legislative history and draw an unwarranted conclusion from the exchange cited. We can find no evidence that any member of Congress addressed the question of whether the "outside influence" exception engrafted on the Rule prior to adoption would affect, one way or the other, the ability to inquire of a juror as to the

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17 *See Rules of Evidence, Hearings Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary*, 93d Cong., 1st Sess.389 (1973).

18 Letter from Prof. Carlson to Congressman Hungate (Apr. 16, 1973), *reprinted in Rules of Evidence (Supplement), Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 93d Cong., 1st Sess.27 (1973).

19 Chairman Hungate summed up the debate on the issue by stating that "the Judicial Conference supported the *committee version in which we would seek to prohibit the quotient verdict . . . .*" 120 Cong.Rec.2,375 (Feb. 6, 1974) (emphasis added).

20 H.R.Rep.No.650, 93d Cong., 1st Sess.9-10 (1973).

drunkenness or incapacity of another juror.[21] Thus, the government's conclusion that the "legislative history of Rule 606(b) reveals that Congress . . . concluded that [evidence of juror intoxication] should not be allowed" (GB 34) cannot be substantiated.

Moreover, as noted in our main brief (PB 34 n.13), the treatises and cases which have subsequently addressed the issue indicate that the Rule, as adopted, *would* permit impeachment of a verdict by proof of influence on a juror, whether such influence be through the use of excessive amounts of alcohol, illegal drugs, or attempts at bribery (*see* PB 34). *See also* 3 D.Louisell and C.Mueller, Federal Evidence § 289 (1979):

> "[T]he present exception [of Rule 606(b)] paves the way for proof by the affidaivt or testimony of a juror that one or more jurors became intoxicated during deliberations. . . . Of course the use of hallucinogenic or narcotic drugs during deliberations should similarly be provable. . . ."

B. The Trial Judge Abused His Discretion In Refusing To Hold An Evidentiary Hearing.

The government strongly relies on the fact that defense counsel "claimed to have noticed jurors sleeping, but . . . failed to call the matter to the attention of the

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21 For example, the Senate Report suggested the House revision would permit testimony that jurors "refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations," but made no mention whether the exception would permit inqury as to drunkenness. S.Rep.No.1277, 93d Cong., 2d Sess.13 (1974). Likewise, the Conference Report, which advocated the Senate revision, noted that the "Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations . . . ," and concluded that "jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations." S.Conf.Rep.No.1597, 93d Cong., 2d Sess.8 (1974).

court at the time" (GB 50), and that although the trial judge was in a position to observe the jurors in the courtroom, he stated that he "didn't see anybody sleeping" (J.A.168; GB 43). The trial judge's statement was not an observation made during the course of trial but, rather, an after-the-fact justification (made more than two months after the verdict) for *not* holding an evidentiary hearing (J.A.124, 168). And, while the trial judge at the post-trial hearing denied that defense counsel had informed him of jurors sleeping during the course of the proceedings, the trial transcript demonstrates that counsel *did* call to the trial judge's attention that jurors were sleeping through the afternoon sessions, and the trial judge made it clear to counsel that it was their responsibility, not his, to keep the jurors' attention (V.12:101). Thus, at the beginning of the afternoon session on March 1 (V.12:99), defense counsel approached the bench and informed the trial judge that he had "noticed over a period of several days that a couple of jurors in particular have been taking long naps during the trial" (V.12:100). The trial judge responded, "[m]aybe I didn't notice because I was—" (the balance of the trial judge's statement does not appear in the transcript) (V.12:100). The trial judge then made it clear that keeping the jurors interested and awake was counsel's "responsibility" and that he was "not going to sit here and watch" (V.12:101).

The government further attempts to avoid resolution of the merits of the question before the Court by contending the affidavit of Juror Hardy was improperly obtained. Rule 2.04(c), Local Rules, United States District Court for the Middle District of Florida, we respectfully submit, has no application to the facts of this case. It provides that where a party " 'believes that grounds for legal challenge to a verdict exists,' " he may then move for a court order " 'permitting an interview of a juror or jurors to determine whether the verdict is subject to the challenge.' " *Id.* (citation omitted). In the instant case, neither the petitioners nor their counsel were attempting to "interview" a juror or jurors so as to trigger application of the Rule. Here, defense counsel was at his home on a Saturday (J.A.241) when a juror approached him in the driveway of his home and told him that because these matters had been "on [his] mind for a long time" he was coming forward to tell him that the jury had conducted itself as though the proceeding was "one big party," had been drinking excessive amounts of alcohol during lunch breaks, and had "smoked marijuana together" during the proceedings (J.A.241-42).[22] Such an unsolicited approach, we respectfully suggest, does not trigger the provisions of the local rule relating to juror interviews.

More significantly—and noticeably absent from the government's brief—is the fact that *prior to approaching defense counsel at his home, Juror Hardy had telephoned the government prosecutor in the case to inform him of the consumption of alcohol during the trial (J.A.230).* This contact apparently triggered no investigation by the government to determine the factual basis of the information;

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22 The government also attacks the statement made by Juror Hardy that he and two other jurors drank a pitcher of beer each "within three hours of rendering a verdict in the case" (J.A.244), contending it should be discounted because "Hardy's affidavit does not confirm [the] account" as recited by Private Investigator Beard's affidavit (GB 44 n.27). But the record clearly shows that Hardy's oral statement was tape recorded on October 15, 1984 (J.A.205); two days later, Hardy read and signed the transcript of that prior oral statement before Beard (J.A.240), and on that occasion he made the further statement regarding the alcohol consumed prior to the deliberations (J.A.244). That Juror Hardy later recalled and recounted this additional important information to Beard is no basis for disregarding it.

nor was Juror Hardy's information disclosed to the court or defense counsel.[23] Certainly, while there are valid reasons for insulating jurors from harassment or intimidation or even from unsolicited questioning by parties or their counsels post-trial (and those have been, and are being, appropriately monitored by the local rules and the appropriate state bars), there is no basis for contending that when a juror voluntarily comes forward to inform defense counsel or the prosecution of improper, and in this instance, *illegal* conduct by jurors, that information should not be promptly and accurately transcribed and reported to the court for action.

If the government is correct and the local rule can be read to prevent a criminal defendant from making a proper preliminary showing in support of a motion for new trial based on jury misconduct, then such rule violates the provisions of the sixth amendment. In *Parker v. Gladden*, 385 U.S.363 (1966), the wife of a defendant, "unaware of any irregularities," began interviewing jurors more than two years after the verdict as a " '[shot] in the dark' " and discovered that a bailiff had made prejudicial comments to several jurors. *Id.* at 366 (Harlan, J., dissenting). This Court held these comments deprived defendant of his sixth amendment "right to a . . . trial, by an impartial jury," and reversed the conviction without

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[23] It is not mere speculation to suggest what action the government is likely to have taken had it learned of the information from Juror Hardy following a "not guilty" verdict, for in several reported decisions involving instances of much less extreme juror misconduct where "not guilty" verdicts had been rendered, the government has proceeded to investigate and then file criminal charges against the jurors involved. *See, e.g., Clark v. United States*, 289 U.S.1 (1933) (juror failed to reveal prior employment with corporation of which defendants had been officers); *United States v. Lampkin*, 66 F.Supp.821 (S.D.Fla.1946) (juror concealed prior conviction).

regard to the questions raised by the dissent as to the manner in which this information was obtained. *Id.* at 364-66.

The decision in *Parker* also disposes of the final argument made by the government in support of the lower court's decision—that the federal rule requiring a unanimous verdict in criminal cases provides a "margin of confidence," so that improper conduct by some, but not all jurors, does not require "close [judicial] scrutiny" (GB 49-50 n.35). Rejecting a similar argument in *Parker* (despite an Oregon law permitting a guilty verdict on 10 of 12 votes, 385 U.S. at 365), this Court noted that "petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Id.* at 366.

Respectfully submitted,

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